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REPORTS OF CASES

DECIDED BY

CHIEF JUSTICE CHASE

IN THE

CIRCUIT COURT OF THE UNITED STATES
FOR THE (FOURTH CIRCUIT,)

DURING THE YEARS 1865 TO 1869, BOTH INCLUSIVE,
IN THE DISTRICTS OF MARYLAND, VIRGINIA,
NORTH CAROLINA, AND SOUTH
CAROLINA.

REVISED AND CORRECTED BY THE CHIEF JUSTICE.

CONTAINING

AN APPENDIX WITH THE CONSTITUTION OF THE CONFED-
ERATE STATES OF AMERICA, AND THE CONSCRIPTION,
IMPRESSMENT, AND SEQUESTRATION ACTS
OF THAT GOVERNMENT.

BY BRADLEY T. JOHNSON,
OF THE VIRGINIA BAR.

NEW YORK:
DIOSY & COMPANY,
1876.

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PREFACE.

THE decision of the Chief Justice in the case of Shortridge v. Macon, at the June Term, 1867, of the Circuit Court for the Eastern District of North Carolina, made a profound impression on the bar of the late Confederate States. It was the first indication of the view which the Federal judiciary would probably take on the legal questions arising out of the late status of war, questions which affected every interest, all property, and lay at the very base of social organization.

If the issue of force, which had just been tried and decided in favor of the Federal Union, was to be regarded by the courts of the successful side as nothing but rebellion, civil tumult, and insurrection, then it was clear that no legal consequence could flow from it, nor could any acts of any agents, created by such rebellion, be acknowledged as having any legal and permanent consequences whatever. Acknowledgments of deeds, protest of notes, records of courts, judicial proceedings, contracts based on the existing state of things would, on that theory, all be void, and inextricable confusion and injury to society would be the consequence.

If, on the contrary, the Supreme Court adopted the theory which the Southern bar believed the true one, warranted and required by every principle of public law, by the precedents of English history, and necessary to the restoration of peace and order in the South—if that august tribunal determined that the late war was WAR, to be judged by all the rules applicable to a war *inter gentes*, then the result would flow necessarily and certainly that all the acts of all the officers, agents, and employees, as well as of the people of each one of the late Confederate States, would be recognized as valid by the Federal tribunals, provided those acts were not in aid of the war

against the Federal Government. On such a sure basis we could look forward to a rapid recrystallization of society and reorganization of social order.

When, therefore, the Chief Justice first sat in Richmond, his decisions attracted universal attention over all that country so vitally interested in the conclusions to which his mind would ultimately come.

It soon became manifest that he was rapidly comprehending the prodigious consequences that would flow from his decisions, and the discussion in Keppel's *Admr. v. The Railroad* was the first outgiving from him of the change that was going on in his mind since the case of *Shortridge v. Macon*.

It then became clear that a body of decisions, discussing the fundamental principles of all law, must result from the questions that would be submitted to him by the bar of Virginia and the Carolinas, and that these decisions would be of great value in settling all doubtful questions in the South growing out of the war.

I, therefore, proposed to the Chief Justice that, if agreeable to him, I would undertake the work of collecting his Circuit Court decisions for publication. He assented to the suggestion with gratification, and subsequently furnished me with copies of his decisions as fast as they were made on circuit.

In the winter of 1872-73 it became apparent that his work was done. The decisions on the questions growing out of the war, made by him on this circuit and in the Supreme Court, had settled the principles on which the new Constitution of the United States was to be administered under the new conditions of society, and his wise and statesmanlike views, impressed by him on the Supreme Court, had prevailed in nearly all courts, and peace and order were thereby largely restored.

The manuscript of this volume was then submitted to him for revision, and he went over the whole of it with the reporter, making such corrections as he deemed necessary. They were generally merely verbal, and in the main consisted of softening the language or expressions used in alluding to the war. He struck out the words "rebellion," "rebels," "insurrection," and "insurgents," and substituted the words "civil war," "belligerents," &c., wherever the sense of the

text would permit, and instructed me to do so wherever he had overlooked it.

I had an appointment with him in Washington the very day he left there for New York, and he postponed it until after his return, when it was proposed to see if there would be room in the volume for his decisions in the Legal Tender cases, and in the case of *Texas v. Chiles*.

But he never returned, and I have left the book just as it came from his revision.

I hope thereby to contribute to the reputation of a judge whose large intellect, strong will, and clear perception of great principles have done much toward quieting discussion and settling differences of opinion on all legal questions growing out of the war, and has thus greatly contributed to the peaceful reorganization of society in the South.

I have added the Constitution of the Confederate States and the acts of the Confederate Congress for the conscription of all arms-bearing citizens, the Impressment Act, and the Sequestration Act, by virtue of which exercise of power the Confederate government assumed and exercised control over all of its citizens, and over all property within its jurisdiction. I have done this in order that it may be seen what force, vigor, and vitality that government had, and to place on record our claims to have been treated as *a government*. Whether a government *de facto* or a government of paramount force, or a regent government, exercising the *occupatio bellica*, or a government *de jure*, overthrown by foreign conquest, the future historian will decide: we are not competent judges.

On the receipt of the intelligence of the death of the Chief Justice, a meeting of the bench and bar of Maryland was held on the 9th of May, 1873, in the United States Court-room in Baltimore, and the following proceedings took place:

The Hon. Reverdy Johnson called the meeting to order by saying, "all are aware that the occasion that brings us together is to pay respect to the late Chief Justice, and, in order that we may organize, I move that the Hon. Justice Giles, United States District Judge, be called to the chair."

This motion being carried, Judge Giles took the chair. On motion of Hon. Reverdy Johnson, Henry Stockbridge, Esq., was chosen to act as secretary.

Mr. Johnson suggested the appointment of a committee to prepare suitable resolutions expressive of the sense of the meeting. The chair accepted the suggestion, and appointed Hon. Reverdy Johnson, I. Nevitt Steele, A. Sterling, W. S. Waters, R. S. Mathews, and J. P. Poe, who retired to draft the resolutions.

The committee in a few minutes reported the following:

Whereas, the bench and bar of Maryland have heard with deep regret the death of Salmon P. Chase, the late Chief Justice of the United States, and desire to express their sense of the loss which has been sustained by the country and by the profession, and of his eminent merits as a man and a judge, therefore, be it

Resolved, That in the death of the late Salmon P. Chase the country has been deprived of the services of a jurist who has fairly adorned his high position, and who, by the purity of his life, the extent and variety of his learning, the comprehensiveness of his intellect and unswerving devotion to justice and law, has left another illustrious example for the inspiration and guidance of our profession.

Resolved, That the spotless integrity which distinguished his discharge of duty in the many official positions to which he had been elevated by the respect and confidence of his fellow-citizens, fully entitles him to an honorable place in history, and to the grateful memories of his country.

Resolved, While the bar of Maryland had not in any large degree the happiness of enjoying those genial and generous qualities which made the late Chief Justice the ornament of every social circle in which he was wont to move, they can not refrain from bearing testimony to the impressions which his attractive qualities made upon them during his comparatively brief attendance in this circuit.

Resolved, That the sympathies of the bench and bar of Maryland are respectfully tendered to the bereaved family of Mr. Chase, and the secretary of the meeting is instructed to forward to them a copy of these resolutions.

Resolved, That the Judges of the Circuit Court are requested to direct a copy of these resolutions to be entered upon the minutes of the court.

The Hon. Reverdy Johnson, in rising to second the pas-

sage of the resolutions, said, he had enjoyed the acquaintance of Chief Justice Chase longer than any other member of the Maryland bar. He (Johnson) had known him at the bar, in the Senate of the United States, and as Secretary of the Treasury of the United States, and in all these several offices he had not only known him generally, but intimately. He had discharged the duties of each with wonderful ability. He came to the bench upon the death of his immediate predecessor, in December, 1864. As Secretary of the Treasury he discharged the high functions of his position creditably, but he had not for years engaged in the active duties of his profession, and there was a doubt of his filling worthily the place of his great predecessor, but at his first Term that doubt was removed; that Term which he first presided was the December Term of 1864.

There were then before the court cases involving many questions of admiralty law, and the rights and duties of citizens of States that had been involved in the War. Chief Justice Chase had on all the questions that had been presented for adjudication given opinions, and discussed each with so much ability that it showed that he was fully acquainted with the knowledge necessary for their proper adjudication. Those opinions were so clearly and elegantly expressed, that they were models of judicial style. The bar and bench at once said that the ermine worn by his predecessor was in hands to preserve it unspotted.

Mr. Johnson sketched the important decisions given by Chief Justice Chase in relation to the Enforcement Act, Legal Tender, and other matters, and said he was not unworthy to fill the place that Marshall had filled for thirty, and Taney for thirty-four, years. What was said by Randolph, of Roanoke, upon the occasion of the death of Marshall, might, with equal propriety, be said of Taney and Chase. He presided with native dignity and unpretending grace. In point of ability he was the equal of either of them.

His opinions will bear the strictest scrutiny, and in learning and moral considerations compare favorably with those of his illustrious predecessor. There are men that survive upon the bench who fully equal him; there are men in the different States in the profession who might equal him, and it is to be

hoped that in his successor may be found in equal degree the attributes of learning, mental power, courtesy of manner, and purity of character.

R. Stockett Mathews rose to second the motion of Mr. Johnson for the adoption of the resolutions reported by the committee. He said: He could not refrain from giving some expression to his accord with the thoughts expressed by Mr. Johnson. Mr. Mathews recalled Chief Justice Chase as he had seen him when full of life and vigor and manly beauty. Never had the speaker seen a man whose mere presence so impressed the beholder with a sense of capacity. He possessed a strong power of reasoning, that enabled him to grasp the most difficult subjects and wrest from them their simplicity and clearness.

He was a large man in the broadest sense of the term. Not a mere lawyer in unquestioning servitude to tradition, or in blind veneration for precedents, he sought to reach results in his decisions which would stand the tests of mutation of opinion, and changing conditions of society in coming generations. He did not seek mere popularity nor present applause, but with sure precision was always able to anticipate the judgment of the future. In his brave grasp of difficult problems it was of himself and his personal interest that he thought last. He possessed in a remarkable degree the suavity of temperament, and the kindly graces of heart which drew towards him the homage and friendship of others with whom he associated, and especially of younger men, whom he never overwhelmed with inconsiderate exhibitions of his rank and greatness, but sought to win them by placing at their service his wealth of gathered stores, his ripe wisdom, and his sympathetic counsels. He numbered, perhaps, more warm admirers and a larger number of devoted friends than any statesman of his time. And one of them, in the dispatch sent to apprise his family at Washington of the sudden decease of Mr. Chase, has eloquently described him in a single sentence, "Our grand man is gone." Mr. Chairman, he was a grand man. It has been said that he was ambitious. But who, with such noble powers, such generous instincts, would not desire to put every great faculty at the service of his country. He was ambitious for a larger field and ampler opportunities to do good

and to achieve greatness for his nation rather than for himself. He may have felt that he was better fitted for the administration than the interpretation of law. One thing is assured beyond all cavil—he filled many stations and discharged great trusts, and he adorned every position with the beauty of spotless probity, and fulfilled every duty with a disinterested patriotism which has seldom been surpassed. Mr. Mathews then drew a touching picture of Mr. Chase's appearance when he last saw him, some months ago, in Philadelphia, speaking of him as the "counterfeit presentment" of his former self, and closed with a warm tribute to his native royalty of heart, the charm of his manners, and the dignity of his public life.

When Mr. Mathews concluded, the resolutions were put by Judge Giles, and were unanimously adopted. The meeting then adjourned.

On the same day a similar meeting of the bench and bar of Virginia took place in the United States Court-room in Richmond, which was presided over by the Hon. James Lyons, with M. F. Pleasant, Esq., Clerk of the U. S. Circuit Court, as secretary.

Messrs. William Green, W. A. Maury, Bradly T. Johnson, James Neeson, Hon. E. H. Fitzhugh, Judge of the Chancery Court for the city of Richmond, Hon. Beverly R. Willford, Judge of the Circuit Court for the city of Richmond, E. Barsdale, Jr., Esq., W. W. Henry, Charles Dabney, Hon. James C. Taylor, Attorney-general of Virginia, John O. Steger, and John Howard, were appointed a committee to prepare and report suitable resolutions. They reported the following:

Seldom is it that the hand of Death snatches from the place of honor a man more inspired by greatness and moral worth than Salmon Portland Chase, to whose memory we are now come together in these precincts of justice, which will know him no more forever, to lay tribute.

His sudden death, after being so recently amongst us in apparently improved health, and deepening the impressions he had already made upon our minds and hearts, has caused a shock, from which we shall not soon recover, and is another solemn lesson that "the paths of glory lead but to the grave." From one end to the other of this broad and varied land will his death produce grief, and a sense that this time, in very

truth, has Death pulled down a great pillar of State, and that there are few in the land to supply his place.

Called to the position of Chief Justice of the Supreme Court of the United States from the station of Secretary of the Treasury, as was his distinguished predecessor, like him he rose superior to the passions and prejudices of the hour. His greatness could not have been subjected to a more crucial test than by his succession to the position made vacant by the death of that mirror of justice and judicial propriety, the venerable and ever-to-be-revered Roger Brooke Taney. It had been many years since Mr. Chase had any experience at the bar when he was made Chief Justice; and had he not been a man of extraordinary endowments, his appointment would have been a serious mistake, but it turned out that in his case the particular in which he was thought to be wanting—a sufficient practical acquaintance with jurisprudence—was one of his best qualifications, for he went on the bench at a time when he was soon to encounter those new and important questions which arose in the Southern States after the close of the War—questions which were only to be satisfactorily resolved by a mind of vigorous and comprehensive grasp, accustomed to a frequent recurrence to great principles, but, at the same time, accustomed to range untrammelled by precedents. That the mind of Chief Justice Chase was of that stamp, no person of discernment will question. It may be safely said that there was no man known to us who was better fitted to handle those novel questions than he was. His boldness and independence, and at the same time his sobriety as a thinker, are too well known to be more than referred to. There was a massiveness and self-reliance, a solidity and equilibrium about his mind that were impressive, and singled him out as one born to figure in matters of great concernment. The high traits of his intellect were conspicuously shown while he was at the head of the Treasury, the duties of which position he administered with distinguished sagacity and originality; so much so that he falsified predictions as to the effect of his measures confidently made in high quarters in Europe. The consciousness of his masterly administration in finance was, it is believed, a source of great satisfaction to him.

Endowed with an intellect of such characteristics—mind impatient of things narrow or technical—it was exceedingly opportune that during the brief period he held a judicial station, there was work for him of a kind both suitable and congenial. He at once began to deal very masterly with the great international questions that came before the Supreme Court, sitting as a tribunal of prize ; but, perhaps, in no cases did the greatness of his judicial qualifications so generally impress themselves on the whole country as in those cases usually called “the gold cases.” His judgments in those cases were couched in terms so luminous, and enforced by reasoning so irresistible, that all previous doubts and conflicts—and they were many—were at once laid, and men wondered that a matter, now so clear, should ever have been obscured by misgivings. It is an interesting coincidence that the Chief Justice should have most distinguished himself as a Judge in cases involving questions about the currency.

The greatness of Chief Justice Chase was set off by a striking simplicity and directness, both in manner and diction. What he said was briefly said, and yet it always appeared by a *curiosa felicitas* to be fully said. His brevity was never cramped or straightened, but his subject was laid before you in all its length and breadth and thickness.

His character was pure and spotless, and notwithstanding his life before his elevation to the bench was passed in times of great bitterness and rancor, in which he was a prominent actor, there never was a suspicion of his integrity.

Viewed in his social relations there is none of us who will not treasure the recollection of his personal intercourse with the deceased, or that will ever forget his geniality, tempered only, but not diminished, by a perfect and quiet dignity, or that readiness to listen, and entire freedom from dogmatism, which lent such a charm to his society.

Resolved, That this meeting of the bar and judges of Virginia is deeply penetrated by a sense of the calamity which they, in common with the rest of the people of the United States, have sustained in the death of the Hon. Salmon Portland Chase, and that they will ever cherish his memory, which is endeared to them no less by many personal attractions and associations than by his eminent ability and wisdom.

Resolved, That we will wear the usual badge of mourning for thirty days.

Resolved, That the chairman of this meeting be requested to present a copy of the foregoing preamble and resolutions to the Circuit Court of the United States and the Supreme Court of Appeals of Virginia, at Richmond, with the request that the same be spread on the minutes of the said courts.

Resolved, That the chairman of this meeting be requested to transmit a copy of the preamble and resolutions aforegoing to the family of the deceased.

William A. Maury, Esq., moved the adoption of the resolutions, when General Bradley T. Johnson addressed the meeting as follows:

Mr. Chairman: In the vicissitudes of life a man is seldom called upon to perform a sadder duty than I undertake now; for I am to speak of the death of one who was not only the lover of the liberties of this whole country, and the defender of its Constitution, but he was the sincere sympathizer with the distress of my own broken and suffering people, the brave champion of their rights, and my personal friend. But now, while the country stands awe-struck at this unexpected dispensation of Providence, which has taken from it one of its foremost men, and words but faintly express our feelings, it is right and proper that we should bear our testimony, however humble, to his character as a man, his conduct as a statesman, and his purity and wisdom as a magistrate.

From the beginning of that career, which was to become so illustrious in American history, he evinced that high moral courage in the enunciation and defense of principles he thought true—that consistency in the maintenance of them, and that intrepidity in following them out—that have long since elicited the admiration of all, even those of us who differed from him so widely and so irreconcilably. Coming in the flush of mature manhood to the Senate of the United States, he so bore himself in that high arena as to prove himself worthy of his great compeers. Called thence to preside over the destinies of one of the American commonwealths, he guided her action during those trying times so as to earn the applause of his fellow-citizens who had placed him there; and immediately afterwards, placed in charge of the finances of the

United States, his will, sagacity, and skill so conducted them that he became probably the most efficient support of his government in the civil war. He was placed on the Bench in the last months of that struggle, and he at once appreciated clearly the great opportunities which opened on the cessation of it.

He rose to the height of statesmanship which those opportunities required, and he was earnest in his efforts that they should be improved.

He perfectly appreciated the danger to Republican liberty from the tremendous accession of power brought to the government by such a prodigious effort of national life, and his first endeavor was to restore the supremacy of the civil law over military rule ; to bring back the rule of right and justice over that of force and the strong hand.

Acting under the conviction of the absolute necessity for this, he sought to expedite it by declining to exercise his judicial functions in the territory lately in arms until civil authority was restored, until the writ of the law became supreme over the order of the soldier. He pressed upon the President the justice and necessity that this state of things should at once be inaugurated, and in 1867, when the proclamation of the Executive of the United States had assured the world that such was the case, he first entered upon his duties here.

His first coming among our people was received respectfully and unostentatiously. He had been the life-long adversary of our political systems and our social organization, and his genius, more than that of any one man, had contributed to our overthrow, and we waited to see what application of his principles we should be called on to observe.

A short time sufficed to dispel all doubts. Rising at once to the greatness of the occasion, he eliminated and declared the principles of public law which controlled our circumstances, and from them marked out an application which operated as amnesty, peace, and security for life and property. In the case of *Keppell's Administrator v. The Petersburg Railroad*, he announced that the contest through which we had gone was a civil war, and that all the consequences of general war flowed from it. He declared that the acts of the governments belligerent to the Federal Government, so far as they con-

cerned private rights and personal obligations, were to be respected by the Federal courts, and he held that the court would take judicial notice of the fact that the business transactions of life here during the war were based on Confederate currency, which currency was to be treated as of its real value.

In the case of the *United States v. Morrison*, in the South Carolina district, he decided that the orders of military officers in time of war protected persons obeying them from all liability, penal or personal, for acts of war.

Following these broad and beneficent declarations of legal principles controlling the status of the late Confederate States, his decisions here during the few years he presided in this circuit did more to restore confidence, to reconstruct our shattered institutions, and to rehabilitate peace than all other acts of all other functionaries.

With a contrary course of decision we should have been plunged in endless confusion. All contracts made during the war and acts done, all judicial proceedings, would have been considered void, and years of turmoil and exasperating controversy would have been before us. He saved us all this.

The existence of the State governments *de facto* being granted, all their acts relating to the common affairs of life were sustained and upheld. The actual existence of Confederate currency acknowledged, all transactions based on it became obligatory and enforceable. Immunity for acts of war done in obedience to military orders once secured, prosecutions for treason became well nigh impossible, and so his course of judicial decision at once restored confidence, quiet, and order among our people in all their relations to themselves.

He went further, for he authorized me to record that his judicial opinion in the case of Mr. Jefferson Davis was that the adoption of the fourteenth amendment operated as a complete and perfect amnesty against all political offenses claimed to have been committed during the war, by aiding, assisting, or abetting it.

His decisions have been followed by the Supreme Court, whose adjudications they preceded, and we are indebted to him for the policy of the law adopted and enforced by that tribunal. I do not believe that his abilities as a magistrate are yet fully appreciated by the profession, but I am sure that

the final judgment of the Bar will place his decisions side by side with those of Marshall and Taney, his great predecessors.

His style was exceedingly clear and concise, and I know no happier specimen of judicial expression than that in the case of *The Gary*, where he calls admiralty, "the human Providence that watches over those who go down to the sea in ships, and do their business on the great waters"; nor that other one in the case of *Texas v. Chiles*, where, referring to the language of the old articles of Confederation and of the Constitution, he declares the object of the latter to be "to make more perfect the perpetual Union" created by the former—"thereby creating an indissoluble Union of indestructible States."

His purity as a man was beyond the breath of suspicion. While at the head of the treasury of the United States, disbursing the enormous expenditures of the war, his salary being insufficient to support his family, he paid his annual expenses out of the savings of former years, and went out of the treasury a poorer man than he went into it. He was ambitious—not eager for applause nor desirous of the approbation of the public—but ambitious of serving his country and of re-uniting her dissevered members; for, he said, his only desire to be President arose from the conviction that he could bring back reconciliation and peace were he entrusted with the power of Chief Executive to mould the policy of the government.

He was so warm a friend, and so thoroughly a sympathizer with us, that he desired to make his home in this city; and on his last visit here he told me that if the house of the late Chief Justice Marshall had not been occupied by the gentleman who lives in it, he should have purchased it and fitted it up as his permanent residence and home. In his death the country has been deprived of a great magistrate, and we have lost a staunch and able friend.

Colonel H. Coulter Cabell followed in some remarks stating that he had known Chief-Justice Chase in early life, and in late years, and that he bore willing testimony to his rare ability and personal qualities.

The resolutions were then adopted. On presenting them to the Circuit Court of the United States, the Hon. James Lyons, the Chairman of the meeting, paid a tribute of high

eulogy to the character and abilities of the Chief-Justice, and mentioned an incident which occurred during the reconstructive era, when Mr Lyons casually mentioned to him that a staff officer of the general commanding had been detailed to do duty as presiding Judge of the Court of Appeals of Virginia.

Upon the Chief-Justice expressing his incredulity as to such a fact, thinking that a jest was being made with him, the morning paper was produced, in which the military order was published, relieving an officer from duty as Judge of the Hustings Court, of the city of Richmond, and detailing him as Judge of the Supreme Court of Appeals of Virginia. "Great Heavens!" said the Chief-Justice, "and will your Bar consent to appear before a Court thus constituted?"

His Honor Judge Bond said :

Gentlemen of the Bar,—It is with sorrow for the occasion which requires it that I yield to the motion which you have offered.

For the loss of the late Chief-Justice, the nation at large will lament. His past eminent services in the Congress of the United States, in the Cabinet during the most trying period of the nation's history, and on the bench of the Supreme Court since, have taught all his fellow-citizens to revere and honor him who love integrity and moral and intellectual worth. But to the bar and people of this judicial circuit his loss is particularly severe and painful.

Assigned to this circuit, and coming among you as he did, immediately after the close of the war, when the citizens of these States, alarmed by the result, were doubtful of the future—when the rights of property and personal security were altogether unsettled—he was enabled by his great ability and knowledge of jurisprudence, notwithstanding the many new questions arising out of recent events, to inspire confidence in the courts of the United States, to restore quiet of mind, and to hold so evenly the balance of justice among his fellow-citizens who had widely and vehemently differed with him in the political forum, as to win the good opinion of the whole bar.

One by one rapidly those who endured the strain and severe anxiety of the great conflict—depart, men whom the Republic would long delight to honor—but among those whom

we lament there is no one who will hereafter be thought to excel in uprightness, ability, integrity, and patriotic devotion to the best interest, of his country in war and peace, Salmon P. Chase.

I shall direct your proceedings to be entered on the minutes of the court, and will adjourn at once in respect to the memory of the deceased. The court then adjourned.

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DECISIONS
OF
CHIEF-JUSTICE CHASE
IN THE
CIRCUIT COURT OF THE UNITED STATES FOR
THE FOURTH JUDICIAL CIRCUIT.

1867—1871.

CASE OF JEFFERSON DAVIS.

THE City of Richmond, the capital of the Confederate States, having been evacuated by the military forces of that government on the second and third days of April, 1865, the Honorable Jefferson Davis, the president of the Confederate States, left that city, with his cabinet, and proceeded to Danville, Virginia. He remained at this place endeavoring to reorganize resistance to the armies of the United States, when the surrender of General Lee on the nineteenth of April, at Appomattox Court House, destroyed all hopes of present success in Virginia; and on the eleventh he proceeded to Greensboro, in North Carolina, fifty miles distant, whither he summoned Generals Johnston and Beauregard, then commanding the Confederate troops in North Carolina, which were facing and falling back before the armies of General Sherman. While here the pressure of military necessities forced Johnston into negotiation with Sherman for a general pacification of the States of the South, forming the Confederate States, on the basis of a return of States and citizens to their positions

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as members of the United States, and an absolute cessation of all resistance to the laws of the United States.

These negotiations did not meet with the approbation of Mr. Davis, and he left Greensboro while they were pending, accompanied by his cabinet and a cavalry escort of detachments from Ferguson's and Dibbrell's brigades of Wheeler's division. He journeyed at easy stages of twenty miles a day, and halted at Charlotte, ninety miles distant from Greensboro, to learn the result of the memorandum, or basis of agreement for a peace, which had been signed by Johnston and Sherman on the eighteenth, four days after his departure from Greensboro.

The President of the United States disapproved the memorandum of the eighteenth of April, just referred to, and Johnston, on the twenty-sixth, entered into and executed a military convention with Sherman, by which his whole command, comprising all troops east of the Chattahoochie, were bound to lay down their arms on condition of being paroled to remain unmolested while they obeyed the laws, the officers being allowed to retain their sidearms. As soon, however, as Mr. Davis learned of the failure of the memorandum of the eighteenth, he proceeded with his escort through Abbeville, South Carolina, to Washington, Georgia, which place he reached on the second of May. On the fourth he dismissed his escort, and on taking leave of its commander said :

“I expected to cut my way through to a place of safety, with the two detachments of cavalry along with me, but they have become so much demoralized by the reports of stragglers and deserters from Johnston's army, that I can no longer rely on them in case we should encounter the enemy. I have therefore determined to disband them and try to make my escape, as a small body of men can elude the vigilance of the enemy easier than a larger number. They will make

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every effort in their power to capture me, and it behooves us to face these dangers as men. We will go to Mississippi, and there rally on Forrest, if he is in a state of organization, and it is to be hoped that he is ; if not, we will cross the Mississippi river and join Kirby Smith, and there we can carry on the war forever.

“Meet me south of the Chattahoochee, as this department has been surrendered without my knowledge or consent.”

Leaving Washington he proceeded, with the officers with him, and his family, westward through Georgia, when on the tenth he was captured with his whole party at Irwinsville, Wilkinson County, by Lieutenant-Colonel Pritchard of the 4th Michigan Cavalry, and a part of his command, belonging to Wilson's Corps. With him were John H. Reagan, late governor of Texas, and subsequently postmaster-general of the Confederate States, Colonel Burton N. Harrison, private secretary of the President, Stephen R. Mallory, secretary of the navy, and others, with a train of five wagons and three ambulances.

He was taken to Savannah and thence by steamer to Fortress Munroe, in Virginia, where he was confined in one of the casemates of the fortification until the thirteenth day of May, 1867, when he was released on bail, in the manner and under the circumstances which it is the purpose of this statement to record.

During the time between the surrender of General Lee on the ninth of April, and the arrival of Mr. Davis at Washington, Georgia, on the second of May, momentous events were transpiring elsewhere.

The President of the United States was assassinated at a theatre in Washington on the night of April fourteenth.

Andrew Johnson, vice-president, immediately took the official oath and assumed the duties of president,

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and the whole country was thrown into a paroxysm of excitement. On the second of May, the day the President of the Confederate States reached Washington, Georgia, the President of the United States, issued the following proclamation :

“ *Whereas*, it appears from evidence in the Bureau of Military Justice, that the atrocious murder of the late president, Abraham Lincoln, and the attempted assassination of the Honorable William H. Seward, secretary of state, were incited, concerted, and procured by and between Jefferson Davis, late of Richmond, Virginia, and Jacob Thompson, Clement C. Clay, Beverly Tucker, George N. Sanders, W. C. Cleary, and other rebels and traitors against the government of the United States, harbored in Canada :

“ Now, therefore, to the end that justice may be done, I, Andrew Johnson, President of the United States, do offer and promise for the arrest of said persons, or either of them, within the limits of the United States, so that they can be brought to trial, the following rewards : one hundred thousand dollars for the arrest of Jefferson Davis ; twenty-five thousand dollars for the arrest of Jacob Thompson, late of Mississippi ; twenty-five thousand dollars for the arrest of George N. Sanders ; twenty-five thousand dollars for the arrest of Beverly Tucker ; and ten thousand dollars for the arrest of William C. Cleary, late clerk of Clement C. Clay. The Provost-Marshal General of the United States, is directed to cause a description of said persons, with notice of the above rewards, to be published.”

The Attorney-General of the United States, the Honorable James Speed, of Kentucky, had on the previous day given his official opinion in writing to the President of the United States, “ that persons implicated in the murder of the late President Lincoln, and the attempted assassination of the Honorable William

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H. Seward, secretary of state, and an alleged conspiracy to assassinate other officers of the Federal Government at Washington City, and their aiders and abettors, are subject to the jurisdiction of and legally triable before a military commission."

On the first day of May therefore, the President of the United States, issued his order, reciting this opinion of his Attorney-General, and directing the Assistant Adjutant-General to detail nine competent military officers to serve as a commission for the trial of said parties, and that the Judge Advocate-General proceed to prefer charges against said parties for their alleged offenses.

The proclamation offering the reward for Mr. Davis on its "appearing from evidence in the Bureau of Military Justice" was made the next day, May second, and it is clear, therefore, it was the intention of the Government of the United States at that time to try him before a military commission on the charge of having procured the assassination of Mr. Lincoln. He was captured, as we have seen, by Lieutenant-Colonel Pritchard and a detachment of cavalry, on the tenth of May.

As soon as he was in custody at Fortress Munroe, preparations were made to try him. Notwithstanding the proclamation of May second, offering a reward for his apprehension as an inciter in the murder of Mr. Lincoln, the government at once resolved to prosecute him for treason.

About the same time the President of the United States sent the Hon. Preston King, of New York, to Judge John C. Underwood, judge of the United States district court for the district of Virginia, to request the latter to wait upon him at the executive mansion in Washington. The consultation between the president and the judge was had at once, the subject of it being the prompt initiation of legal proceedings

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against the leaders of the civil war (on the losing side of course), some of whom they thought especially responsible for the late assassination.

The president learned, on inquiry, that a court was to be held in Norfolk during the month of May, and that the grand jury had been already summoned. He and Mr. King expressed the desire, and believed it to be the duty of the court, to present to the grand jury the views of the Supreme Court of the United States, as expressed by Mr. Justice Greer, that the late civil war was a rebellion, and that those who had been engaged in it were, not only enemies to the United States, but were also guilty of treason, and that the more prominent and guilty leaders ought to be indicted for their conduct, resulting, as they thought, and culminating in the assassination of Mr. Lincoln.

Although Judge Underwood had previously taken the position that the great conflict had outgrown the character of a rebellion, and had assumed the dimensions of a civil war, and that sound policy and humanity demanded that the technical treason of its beginning should be ignored, and that it should be treated only as a civil war, and those engaged in it only as enemies, he says that under the overwhelming excitement of the times, he for a time distrusted his own judgment, thinking, perhaps, that his education in the principles of the Society of Friends and his former hostility to capital punishment had misled him, and he consented to charge the jury as they advised.*

After this interview he proceeded to Norfolk, opened the court there, and did charge the jury in the precise language suggested by the President and Mr. King, with the limitation that it would be improper to include in their presentments any but the most influential and guilty, naming no one. Upon this the grand

* Memorandum furnished by Judge Underwood.

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jury found an indictment against Mr. Davis and others for treason, but the motion of the District-Attorney for bench warrants was refused, the court taking the ground that in no event would bench warrants be issued against those who had surrendered to commanding generals on parole, and who had kept the faith on which the parole was granted. This indictment has been lost from the records of the court during the summer of 1865. The case of Mr. Davis was specially considered in the cabinet, and the question discussed whether he should be prosecuted in Virginia, Maryland, Pennsylvania, or the District of Columbia, acts of war having been committed within each of those jurisdictions by the armies of the Confederate States, of which Mr. Davis was president and constitutional commander-in-chief.

An indictment was found in the District of Columbia, but no process was ever issued on it, and matters remained thus until the twenty-first of September, 1865, when the Senate of the United States, by resolution, called upon the president for information on the subject of the trial.

In response to this inquiry the following reports were submitted from the secretary of war, Honorable Edwin M. Stanton, and the Honorable James Speed, attorney-general :

“WAR DEPARTMENT, January 7, 1866.

“Sir: To the annexed senate resolution, passed on the twenty-first day of December, 1865, referred to me by you for report, I have the honor to state :

“1. That Jefferson Davis was captured by the United States troops in the State of Georgia, on or about the tenth day of May, 1865, and by order of this department has been, and now is confined at Fortress Monroe, to await such action as may be taken by the proper authorities of the United States government.

“2. That he has not been arraigned upon any in-

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dictment or formal charge of crime, but has been indicted for the crime of high treason by the grand jury of the District of Columbia, which indictment is now pending in the Supreme Court of said district. He is also charged with the crime of inciting the assassination of Abraham Lincoln, and the murder of Union prisoners of war, and other barbarous and cruel treatment toward them.

“3. The president deeming it expedient that Jefferson Davis should be put upon his trial before a competent court and jury for the crime of treason, he was advised by the law officer of the government that the proper place for such trial was in the State of Virginia. That state is within the judicial circuit assigned to the chief justice of the Supreme Court, who has held no court there since the apprehension of Davis, and who declines for an indefinite period to hold any court there.

“The matters above stated are, so far as I am informed, the reasons for holding Jefferson Davis in confinement, and why he has not been tried.”

The then attorney-general enters into an argument to show that, although originally captured by the military, Jefferson Davis and other parties alluded to are, after a cessation of hostilities, subject to trial only by the civil courts.

The following are his official conclusions: “I have ever thought that trials for high treason can not be had before a military tribunal. The civil courts have alone jurisdiction of that crime. The question then arises: Where and when must the trial thereof be held? . . . It follows, from what I have said, that I am of opinion that Jefferson Davis and others of the insurgents ought to be tried in some one of the states or districts in which they in person respectively committed the crimes with which they may be charged.

“When the courts are open, and the laws can be

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peacefully administered and enforced in those states whose people rebelled against the government—when thus peace shall have come, in fact and in law, the persons now held in military custody as prisoners of war, and who have not been tried and convicted for offenses against the laws of war, should be transferred into the custody of the civil authorities of the proper districts, to be tried for such high crimes and misdemeanors as may be alleged against them.”

On the sixteenth day of January, 1866, the senate called upon the president for the correspondence between himself and Chief Justice Chase.

On the second day of February the president responded, enclosing the following correspondence between himself and the Chief Justice :

“ EXECUTIVE MANSION, Washington, D. C.,

“ October 2d, 1865.

“ Dear sir : It may become necessary that the government prosecute some high crimes and misdemeanors committed against the United States within the district of Virginia.

“ Permit me to inquire whether the Circuit Court of the United States for that district is so far organized and in condition to exercise its functions that yourself, or either of the associate justices of the Supreme Court, will hold a term of the Circuit Court there during the autumn or early winter, for the trial of causes ?

“ Very respectfully,

“ ANDREW JOHNSON.

“ Hon. S. P. Chase,

“ Chief Justice Supreme Court.”

“ WASHINGTON, Thursday evening, Oct. 12, 1865.

“ Dear sir : Your letter of the second, directed to Cleveland, and forwarded to Sandusky, reached me there night before last. I left for Washington yesterday morning, and am just arrived.

“ To your inquiry, whether a term of the Circuit

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Court of the United States for the district of Virginia will be held by myself or one of the associate justices of the Supreme Court during the autumn or early winter, I respectfully reply in the negative.

“ Under ordinary circumstances, the regular term authorized by congress would be held on the fourth Monday of November, which, this year, will be the twenty-seventh. Only a week will intervene between that day and the commencement of the annual term of the Supreme Court, when all the judges are required to be in attendance at Washington. The time is too short for the transaction of any very important business. Were this otherwise, I so much doubt the propriety of holding circuit courts of the United States in states which have been declared by the executive and legislative departments of the national government to be in rebellion, and therefore subjected to martial law, before the complete restoration of their broken relations with the nation, and the supersedure of the military by the civil administration, that I am unwilling to hold such courts in any such states within my circuit, which includes Virginia, until congress shall have had an opportunity to consider and act on the whole subject.

“ A civil court in a district under martial law can only act by the sanction and under the supervision of the military power ; and I can not think it becomes the justices of the Supreme Court to exercise jurisdiction under such conditions.

“ In this view, it is proper to say that Mr. Justice Wayne, whose whole circuit is in the rebel states, concurs with me. I have had no opportunity of consulting the other justices, but the Supreme Court has hitherto declined to consider cases brought before it by appeal or writ of error from circuit or district courts in the rebel portion of the country. No very reliable inference, it is true, can be drawn from this action, for circumstances have greatly changed since the court

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adjourned ; but, so far as it goes, it favors the conclusion of myself and Mr. Justice Wayne.

“ With great respect, yours very truly,

“ S. P. CHASE.”

While these efforts were being made to procure a trial of Mr. Davis on the charge of treason, the official allegation of his complicity in the assassination of Mr. Lincoln was crushed out under the common, general, and uncontroverted belief in its utter falsity, absurdity, and groundlessness. It was never made the basis of any action save the proclamation of the second day of May, 1865, when it was generally believed in the north that he had escaped from the country ; and at the very moment that the assertion of the belief of the government of the United States in his criminality as charged, was being telegraphed wherever there was electrical wire, he was journeying quietly with his cabinet, family, and train of wagons and ambulances through the State of Georgia.

This terrible charge, so publicly made, was abandoned, because utterly without foundation or excuse, but it never was withdrawn. In the meantime the southern states, lately constituting the Confederate States, through their state legislatures, asked the Federal Government to release him and declare a general amnesty, and at the same time efforts, equally unavailing, were being made on the part of distinguished men in the north to procure his release on bail or parole.

A statement of these efforts, as communicated to the reporter by counsel,* is deemed a fit part of this report.

Had Jefferson Davis, or his party with his assent, raised the black flag, denied quarter to prisoners, or otherwise placed themselves, as combatants, beyond the

* The Honorable Charles O'Connor.

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pale of those rules which govern in war, he might have been shot without trial or ceremony, immediately upon his capture, or thereafter, at the captor's convenience. But he never occupied that position, and the government, if inclined, could not have signalized its triumph by ordering a military execution without provoking censures that few are willing to encounter. Probably no such inclination ever existed in any controlling mind.

When traitors and rebels oppose their government by open violence, and are summarily put down, those not slain in the combat may fairly be tried for treason in the civil courts and dealt with as ordinary criminals. The transaction constitutes only a species of riot. But far different results ensue when rebellion maintains itself so long and so effectively as to compel between itself, its people and their territory, on the one hand, and the lawful government on the other, an institution and acceptance of the rules and usages which obtain in regular wars between independent nations. Amongst men claiming to have attained a high civilization, war is recognized as a state or condition governed by law. In its conduct or at its close, morality and justice are not lost sight of. If successful, the rebels acquire the power of establishing an independent state, which all men regard as not only legitimate but honorable in its origin ; if they fail, the victor may be as indulgent as he will or as far as he dare, may consecrate to his revenge the field of their ruin. Whatever severity can be justified at the bar of public opinion, may be practiced ; and certainly no more should be exercised. To the latter proposition every magnanimous spirit will assent. Washington might have failed : Kosciuszko did fail.

Trials for treason in the civil courts are not remedies adapted to the close of a great civil war. Honor forbids a resort to them after combatants in open war have

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recognized each other as soldiers and gentlemen engaged in a legitimate conflict. After they have established truces, exchanged prisoners, and thus made applicable to their hostile intercourse, the laws of chivalry, based upon an acknowledgment of mutual confidence and respect, the rules and usages of war can not in any event be departed from by either. It would be shockingly indecorous for the ultimate victor in such a conflict to send his vanquished opponent before the civil magistrate to be tried as if he were a mere thief or rioter. No soldier imbued with true sentiments of honor could ever consent to such an act. What honor forbids in an individual, policy prohibits in a government. There would be something inexpressibly revolting and contemptible in the subsequent resort of a great power to measures of resentment on this small, mean scale which it actually feared to employ during the conflict.

Other considerations also apply. The civil tribunals have really no functions suitable to such cases. This is manifest as to the chiefs of the rebellion, and it is an exceedingly rare thing as well as a malignant folly ever to prosecute any others. According to the philosophy of government all punishments are inflicted by the executive. The judiciary investigates, ascertains guilt or innocence, and advises the executive of the fact. The latter then discharges the accused from bonds or inflicts punishment as the case may require. Strictly speaking, the judicial power, as a branch of the government, has no office in any criminal proceeding except to advise as to the law, and to inform the executive concerning facts not previously known. The facts requiring ascertainment are of course those only which may be deemed private until developed in proof before the investigating tribunals. Concerning acts which have reached such a measure of notoriety that they can not lawfully be gainsaid, judicial investiga-

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tion or *trial* is impossible. It is obvious that every material fact in the action of Jefferson Davis against the government was of this public nature. It was known and officially recognized by the government in all its departments, that the war existed and that it had become substantially international in its character, thereby involving consequences of deep moment directly affecting every citizen of the republic. That Jefferson Davis was executive chief of the hostile belligerent, was a fact of similar publicity and in like manner known and acknowledged. All courts were bound to recognize these facts and to declare them. The judges could not have submitted them to a jury, nor could they lawfully have admitted any evidence in denial of them. *Pari ratione*, they could not have permitted them to be affirmatively proven by the government. Whenever such circumstances must attend them, trial and judgment can only be regarded as a mockery. Neither can be had without a palpable violation of fundamental principles. No reasonable man can deny that courts and juries are instituted only for the normal state of society. They are the civil police, and their functions are adapted only to the transactions, good and evil, of that condition. When battle is the recognized order of things, the crimes of vanquished combatants are to be condoned or punished according to the law that governs combats.

After an open territorial war of this kind had existed for four years, it might be thought by some that the rebels were still simply criminal violators of the municipal law; and that they ought to be dealt with as such. By way of reasoning it might be urged that the extent of their operations merely intensified their guilt, and should not in any way affect the question. But this reasoning, if such it may be called, proves too much. On the fall of a rebellious state, after sustaining a belligerent attitude for one hundred

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years, its chiefs and leaders might, with equal propriety, be brought to trial as traitors in civil courts, although they and their ancestors had for several generations, been uniformly regarded and treated as public enemies carrying on against the ultimate victor a regular national war. This can not be admitted. The law of nature forbids it; and there are broad and comprehensive doctrines deducible from the universal practice of nations which forbid it. And these doctrines are founded in necessity as well as in reason and justice.

Taking, under positive written law, the narrowest technical view of the subject, one is led to a like result. "Treason," says the constitution, "shall consist only in levying war against the United States or in adhering to their enemies." The latter word means the public enemy, and such enemy himself can not be the traitor. The characters are incompatible. This is a thoroughly established construction; and, consequently, in order to charge the southern confederates with treason under the municipal law it would have been necessary to establish that they were not public enemies in the judicial sense of that phrase, and also that they had *levied* war against the United States. Neither fact could have been truly asserted. Levying war means setting it on foot. Waging war is quite a different thing. It is only in the original conspiracy and in adapting its means to the purposes of active resistance that war can be *levied*. The offense of treason by levying war, as defined in the constitution, stops there. Subsequent acts may, indeed, sometimes serve to show that this offense has been committed; but those subsequent acts can not have that effect if in themselves they amount to waging a formal regular war by a public enemy and are accepted as such by the government. Practically a contrary conclusion results. Once the lawful government acknowledges the actual existence of

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public territorial belligerency, and exercises the rights consequent thereon, including the conversion of the opposite party into a public enemy whose acts, as those of a sovereign *de facto*, are imputable to all within his territory however innocent, thus impressing upon such persons a hostile character, the preliminary action which may have been treason when it occurred, is divested of that character, and is no longer judicially cognizable as such. It is no longer susceptible of a separate consideration and must thenceforth be regarded only as an introductory step which has become part and parcel of the supervening war thus regularly instituted. Technically it is regarded as an incident merged in the principal transaction. A conflict marked by the features alluded to, is to be deemed a regular and formal public war, because it has been clothed with that character by the government itself. The acts of recognition producing this effect must be imputed to free consent, for a government can not set up duress in avoidance of its deliberate act. Marvellously destitute of self-respect must be the state that could offer such a plea.

From the time when actual war has been thus instituted, by mutual consent and recognition, Mars, not Themis, presides over all intercourse between the parties. As before stated, the behests of justice need not remain unfulfilled. The ultimate victor may use his power without ceremony, and inflict upon the vanquished any punishment their faults may merit. His own conceptions of duty to himself as a responsible member of civilized society is the only restraint upon his will. In drawing the line between a war levied and a war waged, narrow views may lead to the suggestion of some difficulties. Doubtless such might arise but they are not insuperable; nor are great principles, essential to the orderly action of civilized states, to be impugned for such reasons. Peculiar and abnormal

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cases, whether actually occurring or merely fancied as possible, are never allowed to confound just distinctions. Besides, the southern insurrection presented no such difficulties. It was a clearly defined and officially acknowledged public territorial war.

These views induced a belief that Jefferson Davis could not be lawfully convicted of treason, and that to compass his death by means of a civil trial, judgment, and execution, would be disgraceful to those who administered the government and discreditable to our people. Therefore, gentlemen at the North entertaining strong opinions against the right and the act of Secession, united in requesting counsel to interpose a defense should anything of the kind be attempted.

On or immediately prior to the thirty-first of May, 1865, it was rumored that Jefferson Davis had been removed from Fortress Monroe to Washington, and was to be there tried upon an indictment for treason. An application to the War Department having eventuated in leave to that effect, an open letter tendering professional aid was sent to Mr. Davis. His unsealed reply was regarded as containing some objectionable matter, and was returned to him for correction. He did not alter it; so the tender remained unanswered; and an application by his counsel for an interview was refused on the ground that he was not in *civil* custody.

The next step in the business was a written application by counsel to President Johnson for the discharge of Mr. Davis on bail or on his parol. The letter was properly referred to the Attorney-General; but no formal answer to it was ever given. It was subsequently suggested that tendering as sureties some leading men who, during the struggle just closed, had been active and zealous supporters of the government, might facilitate a release on bail. In this exigency, Mr. Greeley consented to become a bondsman. On his suggestion, and, in part at least, by his agency, Com-

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modore Vanderbilt and Mr. Gerrit Smith were induced to unite in the responsibility. At all times subsequently, until Mr. Davis' release, these three gentlemen held themselves in readiness to perform this service.

On the eighth of May, 1866, the Circuit Court of the United States for Virginia met at Norfolk, Hon. John C. Underwood presiding, and a grand jury was sworn, which presented the following indictment :

The United States of America, District of Virginia, to wit : In the Circuit Court of the United States of America in and for the District of Virginia, at Norfolk ; May Term, 1866.

The grand jurors of the United States of America, in and for the District of Virginia, upon their oaths and affirmations respectively, do present that Jefferson Davis, late of the city of Richmond, in the county of Henrico, in the district of Virginia, aforesaid, yeoman, being an inhabitant of, and residing within, the United States of America, and owing allegiance and fidelity to the said United States of America, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, and wickedly devising, intending the peace and tranquillity of the said United States of America to disturb, and the government of the said United States of America to subvert, and to stir, move, and incite insurrection, rebellion and war against the said United States of America on the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the city of Richmond, in the county of Henrico, in the district of Virginia aforesaid, and within the jurisdiction of the Circuit Court of the United States for the fourth circuit in and for the district of Virginia aforesaid, with force and arms, unlawfully, falsely, maliciously, and traitorously did compass, imagine, and intend to raise, levy, and carry

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on war, insurrection, and rebellion against the said United States of America, and in order to fulfill and bring to effect the said traitorous compassings, imaginations, and intentions of him, the said Jefferson Davis, afterward, to wit, on the said fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the said city of Richmond, in the county of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the Circuit Court of the United States for the fourth circuit in and for the said district of Virginia, with a great multitude of persons whose names to the jurors aforesaid are at present unknown, to the number of five hundred persons and upward, armed and arrayed in a warlike manner, that is to say, with cannon, muskets, pistols, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States of America, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States of America, and then and there, that is to say, on the said fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the said city of Richmond, in the county of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the said Circuit Court of the United States for the fourth circuit in and for the said district of Virginia, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Jefferson Davis, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in the manner aforesaid, most wickedly, maliciously, and traitorously, did ordain, prepare, levy, and carry on war against the said United States of America, contrary to the duty, allegiance,

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and fidelity of the said Jefferson Davis, against the constitution, government, peace and dignity of the said United States of America, and against the form of the statute of the said United States of America, in such case made and provided.

This indictment, founded on testimony of James F. Milligan, George P. Scarbury, John Good, Jr., J. Hardy Hendren, and Patrick O'Brien, sworn in open court and sent for by the grand jury.

L. H. CHANDLER,

United States Attorney for the district of Virginia.

On the fifth of June, Messrs. James T. Brady, William B. Reed, James Lyons, and Robert Ould, were present at the opening of the court in Richmond as counsel for Mr. Davis. After the usual preliminaries, William B. Reed, Esq., of Philadelphia, then addressed the court as follows :

May it please your honor, I beg to present myself in conjunction with my colleagues as the counsel of Jefferson Davis, now a prisoner of State at Fortress Monroe, and under indictment in your honor's court for high treason. We find in the records of your honor's court an indictment charging Mr. Davis with this high offense, and it seemed to us due to the cause of justice, due to this tribunal, due to the feeling of one sort or another, which may be described as crystallizing around the unfortunate man, that we should come at the earliest day to this tribunal and ask of your honor, or more properly, the gentlemen who represent the United States, the simple question, What is to be done with this indictment? Is it to be tried? This is a question, perhaps, which I have no right to ask. Is it to be withdrawn or is it to be suspended? If it is to be tried, may it please your honor, speaking for my colleagues and for myself, and for the absent client, I say with emphasis, and I say it with earnestness, we come here prepared instantly to try that case, and we

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shall ask for no delay at your honor's hands further than is necessary to bring the prisoner to face the court and enable him, under the statute in such case made and provided, to examine the bill of indictment against him. Is it to be withdrawn? If so, justice and humanity seem to us to prompt that we should know it. Is it to be suspended or postponed? If so, may it please the court, with all respect to your honor and the gentlemen who conduct the business here, your honor must understand us as entering our most earnest protest. We ask a speedy trial on any charge that may be brought against Mr. Davis, here or in any other civil tribunal in the land. We may be now here representing, may it please the court, a dying man. For thirteen months he has been in prison. The Constitution of the United States guarantees to him not only an impartial trial, which I am sure he will have, but a speedy trial. And we have come no slight distance; we have come in all sincerity; we have come with all respect to your honor. We have come with strong sympathies with our client, professionally and personally; we have come here simply to ask that question. I address it to the District Attorney, or I address it to your honor, as may be the more appropriate—What disposition is proposed to be made with the bill of indictment against Jefferson Davis now pending for high treason?

Major J. S. Hennessey, Assistant United States District Attorney, said that he had been entirely unaware of the nature of the application just made, and in the absence of the District Attorney, Mr. Chandler, he was not prepared to answer the question, but would immediately telegraph to that gentleman the fact of such application having been made. Mr. Chandler would probably arrive in Richmond this evening; if he failed to arrive, Major Hennessey stated that he would himself be prepared to answer the question to-morrow morning.

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Judge Underwood [addressing the counsel for Mr. Davis].—I am to understand that will be satisfactory ?

Mr. Reed.—Entirely so.

The court then adjourned.

On the assembling of the court the next day, Judge Underwood, addressing the Assistant District Attorney, said: Mr. Hennessey, we are ready to hear from you, whenever it suits your convenience.

Major Hennessey.—May it please your honor: As the answer of the government to the questions propounded by Mr. Reed on yesterday are considered of some importance, I have written them out, and propose to read them to the court. May it please your honor, yesterday, Mr. Reed, one of the counsel for Jefferson Davis, propounded certain questions to the court and to me, which, in the absence of Mr. Chandler, I at that time declined to answer. Mr. Chandler is still absent, being, I regret to say, entirely prostrated by a recent domestic calamity, and, as I promised, I to-day proceed to reply to the questions of the learned gentleman. That gentleman correctly says that an indictment has been found in this court against his client, Mr. Davis, and asks if it is to be tried, if it is to be dropped, or is it to be suspended ? So far as I am instructed, I believe it is to be tried ; but it will not be possible to do so at present, for a variety of reasons, some of which I proceed to give :

In the first place, Mr. Davis, although indicted in this Court for high treason, is not now, and never has been in the custody of this Court, but is held by the United States Government, as a State prisoner, at Fortress Monroe, under the order of the President, signed by the Secretary of War. In the second place, even if Mr. Davis were in the custody of this Court, it would not be possible for the Attorney-General, in view of his numerous and pressing engagements at the close of the season, to come here now and try this case—which

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is a case of great national importance—which he would be expected to do. In the third place, if Mr. Davis is in the delicate state of health suggested by Mr. Reed. it would be nothing less than cruel, at this hot and unhealthy season, to expose him to the unavoidable fatigues of a protracted trial, which appears to be an inevitable result from the array of counsel, present and prospective, engaged for his defense. Neither this court nor any of its officers has any present control over the person of Mr. Davis, and until they have, it becomes impossible for the District Attorney to say when he will be tried ; but this I assure the gentlemen who represent him here, that the hour Mr. Davis comes into the custody of this court, they shall have full and prompt notice when it is intended to try him, and so far as the District Attorney and his associates are concerned, they may be assured their case will have a just and speedy trial, without further let or hindrance. This I say for the special department of the court which I represent ; but what the intentions of the government are, with regard to the disposition of Mr. Davis, I am no further instructed than I have said. I now move, may it please your honor, that this court, as soon as the business before it is disposed of, do adjourn until the first Monday of October next. By that time the heat of the summer will have passed away, the weather will be cool and pleasant, and should we have the pleasure of seeing these gentlemen here again, they will be more fitted for the arduous labor which their profession constantly imposes upon them. In the meantime, the crystallization process, referred to by the learned gentleman yesterday, will be going on, and his client will be enjoying the cool breezes of the sea at Fortress Monroe, instead of inhaling the heated and fetid atmosphere of a crowded court-room.

James T. Brady, Esq., of New York, one of the counsel for Mr. Davis, then said : If your honor please,

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I did not expect to say one word this morning in reference to the case of Mr. Davis, but some of the suggestions contained in what my learned friend has just read, make it proper for me to state that if Mr. Davis be not technically subject to your honor's jurisdiction, it is only because no copy of this indictment, so far as I am advised, has been served upon him, nor any list of witnesses, nor any act done of those which are required by the statute. It may be true, that in this technical sense he can not now be, and never has been amenable to your authority ; but my brother counsel, Mr. Reed, stated that Mr. Davis was not claiming the benefit of any of those wants of forms, but that on the contrary he was here to express, from his own lips, speaking through us, his ardent desire for an immediate trial. Although it may be very hot in Richmond, it is infinitely worse where he is, and so far as the convenience of the counsel is concerned, they care nothing for that convenience, impelled as they are by a sense of duty.

From my own experience in the city of Richmond, whose hospitality I have enjoyed certainly, I would be happy to remain here through the heats of summer or the frosts of winter. We can only say that we are entirely ready. We know that we can not control the action of the District Attorney. We thank him for his polite response to our questions, and of course we leave the question for such action as the government may think proper to take.

Judge Underwood.—It only remains for the court to say that the District Attorney has correctly represented the views of the government upon this matter. The Chief Justice, who is expected to preside on the trial, has named the first Tuesday in October as the time that will be most convenient for him. The Attorney-General has indicated that it would be utterly impossible for him, under the pressure of his

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many duties, now greatly increased by troubles on the Northern frontier, on so short a notice, to give that attention to this great question which it demands. Under all circumstances the court is disposed to grant the motion of the said District Attorney, and I think I may say to the counsel that Mr. Davis will in all probability at that time be brought before the court, unless his case shall in the meantime be disposed of by the government, which is altogether possible. It is within the power of the President of the United States to do what he pleases in these matters, and I presume the counsel for Mr. Davis would probably find it for the interest of their client to make application directly to the government at Washington, but this court would not feel justified in denying at this time the application both of the Chief Justice and Attorney-General. When the court adjourns, it will adjourn not until the next term, which is in November, but until the first Tuesday in October next, as it is supposed from the array of counsel on both sides that have been named it will be a long term, in which great political and constitutional questions are to be discussed and settled, probably taking two months. It would, undoubtedly, be much more comfortable for the counsel as well as Mr. Davis himself, to have these months in the fall rather than in the summer, because it is in every way more comfortable in Richmond at that time than in the summer. I think the counsel is mistaken in supposing that Fortress Monroe is not as comfortable a place in the summer, as Richmond. When I have been there in the summer, I have found the sea breeze very refreshing.

Mr. Brady [to the court].—But very limited society.

The Court.—The society is limited. However, the government is disposed to extend every reasonable privilege, and I am happy to know that the wife of the

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prisoner is permitted to be with him, and that his friends are permitted to see him.

The motion of the District Attorney, is therefore granted. This court will adjourn, not until November, but until the first Tuesday in October, which time is preferred by the Chief Justice and Attorney-General. The case will then, if not before disposed of, be taken up.

On the seventh of June the Honorable Charles O'Connor of New York, and Honorable Thomas G. Pratt, Ex-Governor of Maryland, representing Mr. Davis, and the Honorable James Speed, Attorney-General of the United States, waited upon Chief Justice Chase at his residence in the city of Washington to ascertain whether he would entertain an application to release Mr. Davis on bail. Of this interview the Chief Justice furnished the reporter with the following statement :

Mr. O'Connor suggested that such an application might be properly made at Chambers in Washington, although out of the district of Virginia in which the indictment had been found, and expressed the hope that it would be entertained, and that bail would be taken.

The Attorney-General did not consent to the hearing of the application, but remarked that, if the Chief Justice was willing to hear it, he would appear on behalf of the government. The Chief Justice said that whenever it should become apparent, either by the proclamation of the President or by the legislation of Congress, or by clear evidence from other sources, that martial law was abrogated and the writ of habeas corpus fully restored in Virginia, he should unite with the district judge in holding the courts in that district. At present, the Federal as well as the State Courts must act in a quasi-military character, subject to such control by the President and by Congress as might be deemed

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essential to complete pacification and restoration. Such action by a subordinate court might be proper; and the District and Circuit Court of the United States for the district of Virginia, could be held by the district judge, subject to such military supervision as should be found needful.

He had been, however, of the opinion that neither the Chief Justice nor any of the Justices of the Supreme Court, exercising, as they did, the highest judicial authority of the nation, could properly join in holding the Circuit Courts under such circumstances. He was still of this opinion.

The President, it was true, had issued a peace proclamation which, in the absence of any action requiring a different interpretation, would probably have warranted the inference that the habeas corpus was fully restored and martial law abrogated in all the States recently in arms against the Union, except Texas. But the proclamation has been followed by other orders from the President through the War Department, inconsistent with this interpretation; and in such a matter as this, the executive construction of an executive act ought to be followed.

If he were to hold the Circuit Court in the district of Virginia in the same manner as in the districts in other States,—as, for example, in the districts of Maryland and Delaware,—it would be his duty to issue a writ of habeas corpus on application in behalf of any person in custody within the district, under or by color of authority of the United States, and examine the question of the lawfulness of such custody.

If, therefore, an application should be made for that writ in behalf of Jefferson Davis, held as everybody knows in such custody within the district, it would be his duty to issue it. What would be the consequences? If martial law is at an end, the custody is clearly illegal, and the prisoner must be discharged, or admit-

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ted to bail, or committed to the State jail or prison of Virginia, under the acts of congress relating to the custody of prisoners.

It was manifestly improper, the Chief Justice thought, for him to interpose in that way with a custody which, upon the supposition that martial law yet exists in Virginia, is purely a matter of military discretion with the President. Under these circumstances the Chief Justice said he could not, at present, depart from the line of action he had prescribed himself. He could not, consistently with his views of public duty, hold a quasi-military court; nor could he hold a court in any district in a State lately in rebellion, until all semblance of military control over Federal Courts and their process and proceedings had been removed by the action of the political departments of the government.

He did not question, but on the contrary approved, the action of the District Court in holding such courts. Such a court was now being held in Virginia by the District Judge. An application to discharge Mr. Davis on bail might very properly be addressed to him: and there was no reason to doubt that, if the government should consent such an order might be made. The District Judge, sitting as he did, might carry out the views of the executive made known through the Attorney-General.

For himself, the same reasons which would restrain him from holding the court, would restrain him even more powerfully from exercising any jurisdiction as a single judge within the district of Virginia; and he must, therefore, decline to entertain the application to admit Mr. Davis to bail.

There was another consideration which would control his present action, even if he felt himself warranted in holding the court. Mr. Davis is now a military prisoner, and not in any sense in the custody of the court.

Before an application to discharge on bail could be

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considered, it would be necessary to inquire into the legality of the military custody, by habeas corpus. An application for that writ, therefore, its allowance and an adjudication that the present custody was illegal, would be indispensable preliminary proceedings; and no application for that writ had been made.

He mentioned this objection to the action desired in behalf of Mr. Davis, without thinking it of much importance, for under ordinary circumstances, no doubt, the objection could be easily removed by an application for the writ, and proper proceedings under it. At present the same considerations which would restrain him from acting on an application to discharge on bail, would equally restrain him from the allowance of a writ of habeas corpus.

After these observations, Messrs. O'Connor and Pratt, with the Attorney-General, withdrew. No application to admit to bail was made.

Although no formal application was made at this time to the Chief Justice, as appears by his own note of the interview between himself and counsel, such application was made to the government, to know if bail would be received, and the offer of bail was unlimited in amount.

Both the President and Mr. Speed evinced favor to the object, and their sincerity can not be fairly questioned. The objection of the Chief Justice towards exercising judicial functions in territory where military law was superior to civil law, making it out of the question for him to act in the case at that time, Hon. Charles O'Connor and Geo. Shea, Esq., of New York, made a formal motion for bail, before Judge Underwood, which was heard in the Attorney-General's office at Washington, on the eleventh of June, and were replied to by the Attorney-General, and on that motion Judge Underwood delivered the following decision :

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I have considered the application made by Mr. Shea, of counsel, to admit Jefferson Davis to bail.

Under the circumstances the application might have been more properly made to me when recently holding the Circuit Court at Richmond.

Under the law, it may doubtless be made also in vacation, and I will briefly state my views of it and my conclusions.

In the states which were lately in active rebellion, military jurisdiction is still exercised, and martial law enforced.

The civil authorities, State and Federal, have been required or permitted to resume partially their respective functions; but the President, as commander-in-chief, still controls their action so far as he thinks such control necessary to pacification and restoration.

In holding the District and Circuit Courts of Virginia, I have uniformly recognized this condition.

Jefferson Davis was arrested under a proclamation of the President, charging him with complicity in the assassination of the late President Lincoln. He has been held ever since, and is now held, as a military prisoner. He is not, and never has been, in the custody of the marshal for the district of Virginia, and he is not, therefore, within the power of the court. While this condition remains, no proposition for bail can be properly entertained, and I do not wish to indicate any probable action under the circumstances.

On the tenth of April, 1866, a resolution had been introduced by Mr. Boutwell, of Massachusetts, instructing the Judiciary Committee of the House of Representatives to inquire whether there is probable cause to believe in the criminality alleged against Davis and others, and whether any legislation is necessary to bring them to a speedy and impartial trial.

This committee had the case under investigation

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until they made their report, with the following conclusions :

When the committee entered upon this investigation in April last, the evidence in the War Department, if accepted as true, was conclusive as to the guilt of Jefferson Davis. The Judge-Advocate-General had taken the affidavits of several persons who professed to have been in the service of the rebel government, and who had been present at an interview between Surratt, Davis, and Benjamin.

Those affidavits were taken by the Judge-Advocate-General in good faith, and in the full belief that the affiants were stating that only which was true.

The statements made by those witnesses harmonize in every important particular with facts derived from documents and other trustworthy sources.

The committee, however, thought it wise to see and examine some of the persons whose affidavits had been taken by Judge Holt. Several of the witnesses when brought before the committee retracted entirely the statements which they had made in their affidavits, and declared that their testimony, as given originally, was false in every particular. They failed, however, to state to the committee any inducement or consideration which seemed to the committee a reasonable explanation for the course they had pursued. And the committee are not at this time able to say, as the result of the investigations they have made, whether the original statements of these witnesses are true or false, but the retraction made by some of them deprives them of all claim to credit, and their statements so far impeached or thrown out upon the evidence given by other witnesses whose affidavits were taken by Judge Holt, that the committee, in the investigations they have made and in the report, have disregarded entirely the testimony of all those persons whose standing has been so impeached.

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The committee are of opinion that it is the duty of the Executive Department of the government, for a reasonable time, and by the proper means, to pursue the investigations for the purpose of ascertaining the truth. If Davis and his associates are innocent of the great crime of which they were charged in the President's proclamation, it is due to them that a thorough investigation should be made, that they may be relieved from the suspicion that now rests upon them.

If, on the other hand, they are guilty, it is due to justice, to the country, and to the memory of him who was the victim of a foul conspiracy, that the originators should suffer the just penalty of the law. The committee are of the opinion that the work of investigation should be further prosecuted; and, therefore, in conclusion, they recommend the adoption of the following resolutions:

Resolved, That there is no defect or insufficiency in the present state of the law to prevent or interfere with the trial of Jefferson Davis for the crime of treason, or any other crime for which there may be probable ground for arraigning him before the tribunals of the country.

Resolved, further, That it is the duty of the Executive Department of the government to proceed with the investigation of the facts connected with the assassination of the late President Abraham Lincoln without unnecessary delay, that Jefferson Davis and others named in the proclamation of President Johnson, of May second, 1865, may be put upon trial and properly punished if guilty, or relieved from the charges if found to be innocent.

No action having taken place, the following correspondence ensued:

EXECUTIVE MANSION, Washington, D. C.,
October 6th, 1866.

Sir: A special term of the Circuit Court of the

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United States was appointed for the first Tuesday of October, 1866, at Richmond, Va., for the trial of Jefferson Davis on the charge of treason. It now appears that there will be no session of that court at Richmond during the present month, and doubts are expressed whether the regular term (which by law should commence on the fourth Monday of November next) will be held.

In view of this obstruction, and the consequent delay in the proceeding with the trial of Jefferson Davis under the prosecution for treason, now pending in that court, and there being, so far as the President is informed, no good reason why the civil courts of the United States are not competent to exercise adequate jurisdiction within the district or circuit in which the state of Virginia is included, I deem it proper to request your opinion as to what further steps, if any, should be taken by the executive with a view to a speedy, public, and impartial trial of the accused, according to the constitution and laws of the United States.

I am sir, very respectfully, yours,

ANDREW JOHNSON.

To the Hon. Henry Stanbery, Attorney-General.

Reply of the Attorney-General.

Attorney-General's Office, Oct. 12. 1866.

The President—Sir: I have the honor to state my opinion, on the question propounded in your letter of the 6th, as to what further may be proper or expedient to be done by the executive, in reference to the custody of Mr. Davis, and the prosecution for treason now pending against him in the Circuit Court of the United States for Virginia. I am clearly of opinion, that there is nothing in the present condition of Virginia to prevent the full exercise of the jurisdiction of the civil courts. The actual state of things, and your several proclamations of peace and of the restoration of civil order, guarantee to the civil authorities, Federal and

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State, immunity against military control or interference. It seems to me, that in this particular there is no necessity for further action on the part of the executive, in the way of proclamation, especially as Congress, at the late session, required the Circuit Court of the United States to be held at Richmond, on the first Monday of May, and the fourth Monday of November in each year, and authorized special or adjourned terms of that court to be ordered by the Chief Justice of the Supreme Court, at such time and place, and on such notice, as he might prescribe, with the same power and jurisdiction as at regular terms.

This is an explicit recognition by Congress, that the state of things in Virginia admits the holding of the United States Courts in that state. The obstructions you refer to, it seems to me, can not be removed by any executive order, so far as I am advised. It arises as follows: Congress, on May 22, 1866, passed an act providing that the Circuit Court of the United States for the state of Virginia should be held at Richmond, on the first Monday of May, and on the fourth Monday of November in each year; and further providing that all suits, and other proceedings which stand continued to any other time and place, should be deemed continued to the time and place prescribed by the act.

The special or adjourned session which was ordered by the court to be holden at Richmond, in the present month of October, was considered as abrogated by force of this act. This left the regular term to be holden on the fourth Monday of November, and if there had been no further legislation by Congress, no doubt could exist as to the competency of the Chief Justice and the district judge of that court then to try Mr. Davis.

But on the twenty-third of July, 1866, Congress passed an act to fix the number of Judges of the Supreme Court of the United States, and to change cer-

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tain judicial circuits. Among other changes in the circuits made by this act, is a change of the fourth circuit, to which the Chief Justice has been allotted. As this circuit stood prior to this act, when allotted to the Chief Justice, it embraced Delaware, Maryland, Virginia, North Carolina, and West Virginia. It was changed by this act by excluding Delaware and adding South Carolina.

It is understood that doubts exist whether the change in the state composing the circuit, will not require a new allotment. Whether these doubts are well founded or not, it is certain that the executive can not interfere, for although, under peculiar circumstances, the executive has power to make an allotment of the Judges of the Supreme Court, yet these circumstances do not exist in this case. A new allotment, if necessary, can only be made by the Judges of the Supreme Court, or by Congress—perhaps only by Congress. Mr. Davis remained in custody at Fortress Monroe, precisely as he was held in January last, when, in answer to a resolution of Congress, you reported communications from the Secretary of War and the Attorney-General, showing that he was held to await trial in the civil courts. No action was then taken by Congress in reference to the place of custody. No demand has since been made for his transfer into civil custody. The District Attorney of the United States for the district of Virginia, where Mr. Davis stands indicted for treason, has been notified that the prisoner would be surrendered to the United States marshal upon a certain capias under the indictment, but the District Attorney declines to have the capias issued, because there is no other place within the district where the prisoner could be kept, or where his personal comfort and health could be so well provided for. No application has been made within my knowledge by the counsel for Mr. Davis for a transfer of the prisoner to civil custody. Recently an

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application was made by his counsel for his transfer from Fortress Monroe to Fort Lafayette, on the ground of sanitary consideration. A reference was promptly made to a board of surgeons, whose report was decidedly averse to change, on the score of health and personal comfort. I am unable to see what further action can be taken on the part of the executive to bring the prisoner to trial. Mr. Davis must for the present remain where he is, until the court which has jurisdiction to try him shall be ready to act, or until his custody is demanded under lawful process of the Federal courts.

I would suggest that, to avoid any misunderstanding on the subject, an order be issued to the commandant of Fortress Monroe to surrender the prisoner to civil custody, whenever demanded by the United States marshal, upon process from the Federal courts.

I send herewith a copy of a letter from the United States District Attorney for Virginia, to which I beg to call your attention.

I have the honor to be, &c.,

HENRY STANBERY,

Attorney-General.

OFFICE UNITED STATES DISTRICT ATTORNEY
FOR VIRGINIA,

NORFOLK, October 8th, 1866.

Honorable Henry Stanbery, Attorney-General of the
United States :

Sir: In compliance with your request, I submit herewith the substance of the verbal statement I made you a few days since in answer to your question, "Why no demand has been made upon the military authorities for the surrender of Jefferson Davis, in order that he might be tried upon the indictment found against him in the United States Circuit Court at the term held at Norfolk in May last."

Two reasons have influenced me in not taking any

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steps for removing him from their custody. The one relates to the safe keeping; the other to his own personal comfort and health. I have never had any doubt but that he would be delivered to the United States marshal of the district, whenever he should have demanded him on a *capias* or other civil process.

But you can readily understand that so soon as he goes into the hands of that officer, upon any action had by me, his place of confinement would be one of the State jails of Virginia.

At Fortress Monroe all necessary precautions can be and are taken to prevent his escape. Over the internal police of a State jail the marshal has no authority, and the safe custody of the prisoner could not be secured save at a very great expense.

Mr. Davis is now in as comfortable quarters as the most of those occupied by the army officers at the fort.

The location is a healthy one. His family have free access to him. He has full opportunity for exercise in the open air.

If his health be feeble, remove him to one of the State jails, and his condition, instead of becoming better, would in all these respects be much for the worse.

His counsel probably understood all this, and I think, will not be likely to take any steps which would decrease the personal comforts or endanger the life of their client.

I have the honor to be, most respectfully, your obedient servant,

L. H. CHANDLER,

United States District Attorney for Virginia.

In June, 1866, Mr. Greeley visited Washington, and also Judge Underwood at Richmond, and actively co-operated in the effort then made, but it was unsuccessful; the cause can only be conjectured.

In August, 1866, Mr. Davis' counsel solicited his

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removal to some Northern prison as a measure calculated to benefit his health, which was then precarious. An investigation at Fortress Monroe by two army surgeons specially selected and sent from Washington for the purpose, resulted in a report that the removal was inexpedient. If allowed, it might have led to an early release of Mr. Davis on bail. Up to this time there seemed some influence—some “power behind the throne”—that kept its eye upon Mr. Davis and vetoed all attempts in his favor. Nine months more elapsed before his release. That event occurred May thirteenth, 1867. Mr. Greeley and Mr. Smith then attended in person at Richmond. Together with Commodore Vanderbilt, they signed the recognizance.

Though no direct promise was ever made, Mr. Stanbery the Attorney-General, and Mr. Evarts his associate, intimated shortly prior to this May circuit at Richmond, that the government would accept bail. Mr. Evarts attended at Richmond on behalf of the prosecution and assented accordingly. Why bail was not accepted in June, 1866, or earlier, and was accepted in May, 1867, is not known. The same persons were offered on both occasions. In 1866, Mr. Davis was ready to give bail in one million dollars; or more, if required; in 1867, bail was not demanded for even one-tenth of that sum.

Mr. Greeley's frank liberality in becoming one of the sureties, and procuring other influential persons to unite with him, was most praiseworthy. In subsequently advising a general amnesty, and actively following it up by an immediate discontinuance of all pending prosecutions, Mr. Attorney-General Evarts entitled himself to the applause of all good men.

The events detailed above, thus spread themselves over nearly the whole of the year, in efforts by his friends to procure a prompt trial or release of Mr. Davis, or inquiries of the Executive as to why he had

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not been or was not about to be tried, or investigations by the Congress of the United States, as to whether the charges against him had any foundation, and why they were not subjected to the test of judicial investigation. The controversy raged as to whether the war had ended, and whether the laws in the Southern States were superior to the military arm of the government.

The President and the Supreme Court held or clearly intimated that peace prevailed in all those regions recently within the belligerent lines of the Confederacy, and that therefore law was and must be supreme. Congress held that the status of war still remained, and by a series of legislative acts, assumed command of the army, and through it exercised military law over all those States and people. It placed States under the command of its generals, who were authorized to execute the laws, and who assumed and exercised the power to make them; who suspended, extended, amended, and repealed laws at their will and pleasure, by general orders issued by their Adjutants-General, and appointed their own staff officers to act as judges of State Courts, paying them salaries out of the State Treasury, which the law provides alone for independent judges, while such officers also received their regular pay, as part of the army of these United States. These generals commanding, not only made the laws and appointed their own subordinates to interpret, apply, and execute them, but in many instances they directed in special orders what decisions should be made, and what judgments rendered in specific cases. They were the executive, the legislative, and the judicial departments of government concentrated into one hand, under what is known historically as the reconstruction measures of Congress.

In Virginia the President Judge of the Supreme Court of Appeals was a staff officer of the general commanding, assigned to that duty; and another one

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of the judges of that court was an officer of the Federal army, receiving his appointment from the same source.

While affairs were in this condition, Chief-Justice Chase refused to sit within the jurisdiction in which a soldier was the ultimate arbiter, and a bayonet the sole symbol of law.

The Circuit Court of the United States for Virginia was however held, having had a brief term in November, 1866, and in May, 1867, the District Judge (Underwood) opened its regular term at Richmond. On the first day of the court and of the month, the following petition was presented to him :

To the Honorable the Judges of the Circuit Court of the United States for the District of Virginia.

The petition of Jefferson Davis, by George Shea, his attorney in fact in this behalf, respectfully sheweth :

That he is, and ever since the nineteenth day of May in the year 1865, has been restrained of his liberty, and held in close custody as a prisoner in jail in that certain strong place of, and belonging to the government of the United States, called Fortress Monroe, within the said District of Virginia, and that Brigadier-General Henry S. Burton is now the commander of said Fort Monroe, and as such holds petitioner in his custody.

That no ground of detention is alleged to the knowledge of your petitioner, or his said attorney, in fact, unless it be in a certain indictment presented against your petitioner at the May term of the above entitled court, held in the year 1866, of which a copy is herewith annexed, marked A.

Your petitioner further shows that the May term was adjourned to meet at Richmond on the fourth day of June, in the year last aforesaid. That at said adjourned term your petitioner appeared by his counsel

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and urged a trial at said adjourned term, offering to proceed without delay, but that the government declined to proceed on said indictment. Your petitioner shows that at the subsequent term of this court your petitioner appeared in like manner, but the government did not bring on the trial.

Your petitioner further shows that his imprisonment aforesaid has greatly impaired his health, and that the continuance thereof through the ensuing summer would involve serious danger to his life, as your petitioner believes.

Your petitioner further says that ample sureties for his appearance to abide judgment on said indictment can be given, if your petitioner shall be admitted to bail.

Your petitioner further shows that his detention, imprisonment, and custody aforesaid, always have been and are exclusively under or by color of the authority of the United States, and that he has reason to apprehend that the government may not proceed to the trial on said indictment at the next ensuing term of said court, which is to be held in Richmond on the first Monday of May, 1867.

Whereupon your petitioner prays that a writ of habeas corpus may issue from this honorable court to be directed to Brigadier-General Henry S. Burton aforesaid, and whomsoever may hold your petitioner in custody, commanding him or them to have the body of your petitioner before the Circuit Court of the United States for the district of Virginia, on the first Monday of May, 1867, at the opening of court on that day, or at such other time as in the said writ may be specified, for the purpose of inquiring into the cause of the commitment and detention of your petitioner, and to do and abide such order as this court may make in the premises. And your petitioner will ever pray.

JEFFERSON DAVIS.

By George Shea, his attorney in fact.

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United States of America, District of Columbia, ss.: George Shea, being duly sworn, says that he is attorney in fact for the petitioner in the preceding petition named; that he is acquainted with the said petitioner, and saw him in close custody, as a prisoner, in Fort Monroe, in the month of March last; that he, this deponent, has a general knowledge of the facts in the above petition stated, and that he verily believes the said petition to be in all respects true.

GEORGE SHEA.

Subscribed and sworn before me, this first day of May, 1867, at Alexandria, Va.

JOHN C. UNDERWOOD,
District Judge.

And thereupon the following writ was granted:

The President of the United States to Brigadier-General Henry S. Burton, and to any person or persons having the custody of Jefferson Davis, greeting:

We command that you have the body of Jefferson Davis, by you imprisoned and detained, as it is said, together with the cause of such imprisonment and detention, by whatsoever name the said Jefferson Davis may be called, or charged, before our Circuit Court of the United States for the district of Virginia, at the next term thereof at Richmond, in said district, on the second Monday in May, 1867, at the opening of the court on that day, and so do and receive what shall then and there be considered concerning the said Jefferson Davis.

Witness, Salmon P. Chase, our Chief Justice of the Supreme Court of the United States, this first day of May, 1867.

W. H. BARRY,

Clerk of the Circuit Court of the United States,
district of Virginia.

By order of the president, the following order was issued:

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WAR DEPARTMENT,
WASHINGTON, D. C., May 8, 1867.

Brevet Brigadier-General H. S. Burton, United States Army, Commanding Officer at Fortress Monroe:

The President of the United States directs that you surrender Jefferson Davis, now held confined under military authority at Fortress Monroe, to the United States Marshal or his deputies, upon any process which may issue from any Federal Court in the State of Virginia. You will report the action taken by you on this order, and forward a copy of the process served upon you to this office.

By order of the president:

E. D. TOWNSEND,

Assistant Adjutant-General.

On the tenth day of May the writ was served on General Burton by the marshal, and, in obedience to the command thereof, he took Mr. Davis to Richmond, and on the 13th made the following return of the writ, producing at the same time the body in court.

In obedience to the exigency of the within writ I now here produce before the within named Circuit Court of the United States for the District of Virginia, the body of Jefferson Davis, at the time of the service of the writ held by me in imprisonment at Fortress Monroe, to the military authority of the United States subject, and surrender of the said Jefferson Davis to the custody, jurisdiction, and control of the said court, as I am directed to do by the order of the President of the United States, under date of May 8, 1867.

H. S. BURTON,

Colonel and Brevet Brigadier-General of the

United States Army.

Mr. Chandler, for the Government, said: General Burton, comes into court to present his return, produces the body of Jefferson Davis, hitherto held by the military authorities, and hereby submits him to the

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control and authority of this court, as he had been commanded to by the President of the United States.

Mr. O'Connor said : On this return, may it please honor, no question arises as to the legality of the former imprisonment. We are advised that there is an indictment against the prisoner in this district, and that your honor will take such course as may be proper in the case.

The Court replied : The return is explicit and satisfactory. General Burton receives the thanks of the court for his prompt and graceful obedience to its writ. General Burton is now honorably relieved of the custody of the prisoner, who passes into the custody of the court, under the protection of American republican law. The marshal will now serve on the prisoner the writ on the indictment now in this court.

Deputy-Marshall Duncan advanced and handed a paper to Mr. Davis, who arose and handed it to Mr. O'Connor.

Mr. O'Connor said : We hope that the court will now order such proper course as justice may require. No further action could be asked by the counsel of Mr. Davis, and it remaining with the court to institute regular civil proceedings, he would acknowledge to have received a copy of the indictment, and would wish to know what further steps would be taken.

Judge Underwood said : The court would be pleased to hear from the representatives of the Government.

Mr. Evarts.—I deem it proper to say that I represent the government on this occasion and in this prosecution, in association with my learned friend the District Attorney, Mr. Chandler. Mr. Davis having passed from military imprisonment to the control and custody of this court, and as an indictment is pending against him and he is now under arrest, it only remains for me in behalf of the government to say, it is not its inten-

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tion to prosecute the trial of the prisoner at the present term of the court.

Mr. O'Connor.—The condition of the case throws upon us the duty of presenting to your honor's consideration some of the circumstances attending it. Jefferson Davis has been imprisoned and in the power of the government, so that any steps thought expedient, just, and consistent with sound policy, might have been taken against him a very long time ago. His imprisonment commenced on the 19th of April, 1865. In this court an indictment was presented against him in May, 1866. Mr. Davis has been at all times since his imprisonment, and particularly during the last year or more of that imprisonment, exceedingly anxious to meet the questions arising on any indictment which might be presented. He was exceedingly anxious to receive the advantages, and enjoy the rights which your honor has so eloquently and justly eulogized in the address made with reference to General Burton—the blessings and advantages of a just, equal, fair, and I may say, benign (for that becomes the occasion) administration of law. No particular civil procedure has been on foot since the indictment was presented, and although the whole period of two years has elapsed since the commencement of his imprisonment, an application of obvious general principles and policy was properly made to the court, while, at the same time, securing due responsibility to law and the ends of justice, to mitigate somewhat the prisoner's condition; for all imprisonment, and the holding of the accused for trial, are adopted for the purpose of securing an answer and the personal appearance of the accused when the question of his guilt or innocence comes fairly before the court. This is ample reason on general grounds. The Constitution of the United States, which we all profess to reverence, assures a speedy trial. But I do not come here to assert that a speedy trial means instantly, nor to assert

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that the government has not on this, as on all other occasions, had a reasonable time to prepare for trial. I do not assert that considerations of policy and convenience may not have had their full weight, although they may bear oppressively on the individual. I do not complain that the government has failed to prosecute last year, or deferred action until the present year. I have no such purpose, because we are bound to respect the authority of the President, the Attorney-General, and their associates and advisers, and only suppose there are public considerations for not proceeding with the trial immediately. But, if your honor please, it is a fact that a gentleman, not very young, and not very remarkable for constitutional vigor—whatever may be said of his mental vigor, has already suffered two years of imprisonment, and it is a fact that, as far as human guarantees can be given for any man, I might say any amount of security for the appearance of the prisoner can be furnished. We can furnish such pledges from gentlemen in every part of the country, of every party, and representing every shade of opinion; gentlemen who, becoming security for him, would profess but one sentiment, and that not for him personally, who are averse to the political views which have distinguished his life in every respect, but who, nevertheless, feel a great interest in the honor and dignity of the American people, and in the American republic, and fear that the punishment of death, in the absence of a trial, would result from his longer imprisonment. I say, then, this kind of assurance can be given; and as that class who differ so widely in opinion are willing to give this security, in order to show their respect for him personally, it furnishes the best proof that they believe he will appear before you whenever required. To this they are willing to pledge their whole estates. These remarks are to express to your honor that we are ready to give bail

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that at a future day Mr. Davis will be ready to appear, without in the meantime being held a prisoner. Fair, reasonable bail, such as may be exacted in ordinary cases, we are now ready to furnish. As the trial must lie over the ensuing summer—as the prisoner has not necessarily to be examined or defended in any way—he is now subject to judicial control, and the question for your honor is, whether the prisoner shall be let to bail, as the learned gentleman proposes. If your honor so determines, then the question arises as to the amount, and the terms, and the division, if desired, on which the security may have been much reduced by imprisonment. I move your honor to accept bail for him. This you will of course do, either on your own judgment or on consultation with other officers of the government as to the amount. I have spoken on the pains of imprisonment. Every freeman will understand that any imprisonment of a free-born American must carry oppression with it, so far as there was a long period of imprisonment. Certainly, during the time Mr. Davis was under the direction and custody of that gallant officer to whom you paid so just a compliment, that imprisonment has had as few pains and as little suffering as could be expected under the circumstances. He was in the hands of a soldier and a gentleman. I do not allude to other times, but speak as to what is before us. Jefferson Davis is now here, under your exclusive direction, and I ask that he have the liberty of free locomotion until you are prepared to try him.

The court said it would like to hear from the other side.

Mr. Enarts.—The imprisonment was under the military authority and jurisdiction of the United States. Its duration, or the circumstances attending it, are to be taken.

The indictment, I am informed, is under a recent

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act of Congress prescribing the punishment for treason, passed in 1862, and which, for the first time in our legislation, has made it proper for the court to inflict less than the death penalty for the crime. Undoubtedly the government, in saying to your honor that they do not propose proceeding against the prisoner during the present term, have presented a proper case for the motion of his counsel ; and it is for your honor to determine on the usual terms, in the discretion of the court, considering all the circumstances of the case as to the propriety of receiving bail. The court has nothing to do with the characters or motives of the sureties ; it could only look to what the law requires with regard to pecuniary responsibility, and for insuring the presence of the accused. I do not know that there will be any indisposition on the part of the prisoner's counsel to meet the amount of bail your honor or the District-Attorney may think suitable. Indeed, from the remarks of the prisoner's counsel, they have the ability and disposition to furnish the requisite security. As to the question of amount, it is for your honor to say what was the proper sum in order to the proper administration of justice.

Mr. Chandler, Dist.-Attorney.—The question now presented is, whether the prisoner shall be admitted to bail. The judiciary act of 1789 provides that the Supreme Court or a judge of a District Court of the United States, may, in any case, even in capital punishment, taking into consideration all the circumstances, admit to bail, exercising a sound discretion. If an indictment was found against the prisoner under a law by which he could not be punished with death, then, as a matter of right, he could give bail.

I will state what I think to be a fair amount of bail, and do so the more freely because there has been some consultation in this matter. I believe the learned counsel associated with me will agree to ask bail in the

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sum of one hundred thousand dollars. I presume there will be no question as to the amount of bail ; it would be as easy a question to determine on that amount as on ten thousand dollars.

Something has been said about gentlemen from all parts of the country, representing all shades of politics, willing to enter surety for the appearance of the prisoner at the next term. So far as suretyship is concerned, we have no objection to take them, but I feel I owe a duty to the government in asking, in addition to gentlemen residing outside of this district, that gentlemen residing in this district shall also enter into security, in order to secure the attendance of the prisoner at the next term.

Mr. O'Conor.—We can meet that question as to bail.

Mr. Chandler.—That is in the discretion of the court. I may remark, in order to avoid embarrassment in the future, that the government would run no risk by requiring some of the sureties to be residents of this district ; while, on the contrary, we would be certain, in case of non-attendance, without having to enter suit in a different jurisdiction, to hold the sureties responsible for the non-appearance of the prisoner.

Mr. O'Conor.—On a question of residence there need be no difficulty. We will give those who will respect their obligations.

Mr. Evarts.—We have no objections, provided the surety is adequate.

Mr. O'Conor.—There are ten gentlemen willing to go security ten thousand dollars each.

Underwood, Judge.—The question is whether the offense is bailable. It is a little remarkable that in the midst of a gigantic civil war, the congress of the United States changed the punishment of an offense from death, to fine and imprisonment ; but under the circumstances it was very honorable to the government of United States, and exhibited clemency and moderation. This

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is a fact which relieves the present case of every doubt as to its being bailable, and it is also in my judgment eminently proper that the motion should be treated with favor, as the defendant has been ready for a year to submit his case to the courts of the country. It is true the prisoner has not until to-day been in the custody of this court. I think, however, no person acquainted with the circumstances of the country, would suppose the fact reflected on the justice of the government, considering the national effect of a great war, which lashed all elements of society into a fury.

It was not to be expected the passions and prejudices aroused would be subdued in a moment, and it is in consequence of the prevalence of the disturbance and tumult which have been abroad in the community, that the government felt that it was not safe to proceed with the case. After consultation with higher judicial officers, it was thought best to omit the trial last fall, but fortunately we have a more agreeable aspect at the present time.

We may now hope for restored confidence, and that we may not be disturbed by violence and commotion. I think there are reasonable assurances in the indications around us, that we are about to enter on a peace more permanent than ever existed before.

I ought, perhaps, to state the fact that this court expects to be in session all this week ; and I have received a letter from Chief Justice Chase, intimating his intention to come to this city if any important cases are likely to be tried.

I ought, perhaps, also to say, in justice to the District Attorney, that he expected to dispose of this case during the present term. I believe he was fully prepared for the final disposition of it at this time, but I have no doubt that the grave considerations have induced the government to take a different course. So it seems the responsibility of the trial is with the govern-

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ment, and not with the court, or the District Attorney, and no doubt for good and proper reasons. The government can not complain, since the delay is its own. I am glad counsel have agreed on the amount of bail. It meets with the approbation of the court, which will not confine the sureties to the district of Virginia. It would no doubt be satisfactory if about one half of the sureties be confined to the state of Virginia. There is no objection to having the remainder of the bail from other portions of the United States. I would inquire of the counsel for the prisoner, whether his sureties are present to enter into cognizances to-day ?

Mr. O'Conor.—They are all prepared.

The Court.—The gentlemen proposing to offer themselves will please come forward.

The names of the sureties were severally called, and they repaired to the clerk's desk and signed the following paper :

Be it remembered that, on this second day of May, A. D. 1868, before the honorable the Circuit Court of the United States for the district of Virginia, at the court-house in Richmond, in the said district, came Jefferson Davis and acknowledged himself to owe to the United States of America the sum of one hundred thousand dollars, lawful money of the said United States, and Gerrit Smith, Horace Greeley, and Cornelius Vanderbilt, each of whom acknowledged himself to owe to the United States of America the sum of twenty-five thousand dollars each, of like lawful money, and William H. Macfarland, Isaac Davenport, Jr., Abraham Warwick, Gustavus A. Myers, William W. Crump, James Lyons, John A. Meredith, James Thomas, Jr., Thomas R. Price, and Thomas W. Doswell, each of whom acknowledged himself to owe to the said United States of America, the sum of twenty-five hundred dollars each, of like lawful money.

The said several sums to be made to the use of the

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said United States of the goods, chattels, lands, and tenements of the said parties respectively.

The condition of this recognizance is such that if the said Jefferson Davis shall in proper person, well and truly appear at the Circuit Court of the United States for the district of Virginia, to be held at Richmond, in the said district on the fourth Monday of November next, at the opening of the court on that day, and then and there appear from day to day, and stand to abide and perform whatever shall be then and there ordered and adjudged in respect to him with said court, and not depart from the said court without leave of the said court in that behalf first had and obtained, then the said recognizance to become void, otherwise to remain in full force.

Taken and acknowledged this thirteenth day of May, 1867. JEFFERSON DAVIS. ,

Horace Greeley, New York.

Augustus Schell, New York.

Aristidus Welsh, Philadelphia.

David K. Jackman, Philadelphia.

W. H. McFarland, Richmond.

Richard Barton Haxall, Richmond.

Isaac Davenport, Richmond.

Abraham Warwick, Richmond.

Gustavus A. Myers, Richmond.

William W. Crump, Richmond.

James Lyons, Richmond,

John A. Meredith, Richmond.

William H. Lyons, Richmond.

John Minor Botts, Virginia.

Thomas W. Boswell, Virginia.

James Thomas, Jr., Richmond.

The Court: The marshal will discharge the prisoner. The marshal did so, when deafening applause followed.

The November term of the court commenced on the

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26th day of November, where, after the swearing in of the grand jury, and the charge of the court to them, Judge Underwood indicating a desire to hear from the gentlemen of the bar any motion they might have to make,

Mr. Everts, of New York, on behalf of the government, said :

If the court please, the case of the United States against Jefferson Davis, which was called at the last term of the court, when the accused was put under recognizance for the attendance at this term, is now to be brought to your honor's notice. I observe the counsel of Mr. Davis in attendance ; and I understand that the prisoner is obedient to the requisitions of the court at any time. The intention of the government in regard to that case is to proceed with the trial of it at some time during the present term of the court, and the considerations upon which the day would be fixed would be but twofold : First, as to the readiness of the government in regard to the production of their proofs, and the attendance of witnesses which, however, would not require any considerable postponement of the trial from the present day. But there is another consideration, and that is, at what time during the present term the public duties of the Chief Justice of the United States Supreme Court would permit of his presiding with his honor, the District Judge, at the trial in this circuit. It is understood that his public duties at Washington during the session, which is to commence on next Monday, will preclude his attendance at this trial, and the government propose, therefore, to name a day which will be in the expected order of business in the Supreme Court of the United States, after the adjournment of that court, and then to proceed with the trial.

As the counsel are in attendance, and as the prisoner is in attendance upon the orders of the court, it is proper that they should both be relieved from any un-

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necessary inconvenience, and that the counsel of the government should also understand what call will be made upon them for attendance here. I propose, therefore, if your honor please, that some day, say the third Wednesday of March, be assigned for the trial.

Judge Underwood.—Do I understand that that is the assent for the counsel for the defense?

Mr. Evarts.—I understand that they have no objection to that course, but the counsel will speak for themselves.

Mr. O'Connor, on behalf of the counsel for Mr. Davis, replied, that they were in attendance, and had no desire to express with reference to the ordinary progress of business, except that it should be conducted in that manner most likely to be attended with the least embarrassment and inconvenience to the defendant and his numerous friends, and to his counsel. They felt themselves bound to render such assistance as might be necessary in securing to him a fair, full hearing. Their personal wishes and convenience would have been greatly promoted by a trial when Mr. Davis was first brought before the court, in May last; and in a greater degree was it true that their personal wishes and convenience would be consulted by proceeding at this time. He was apprehensive that the term of the Supreme Court might continue beyond the time now indicated for the trial, and that, as a consequence, it would be impracticable for the Chief Justice to be here. In that contingency, the defendant and his counsel would be subjected to a renewal of the inconvenience which they had been compelled to suffer, and had suffered uncomplainingly on two occasions. However, he found no fault with the government in its disinclination to proceed in the absence of the Chief Justice. It was undoubtedly desirable, in view of all the interests involved, that two judges should preside when the case is heard. He conceded that the higher

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duty, so to speak, of the Chief Justice to be present in the Supreme Court of the United States, and there to preside, prevented him from being present and giving his attendance to this case at this time. He would have been pleased, as would also his associates, in this doubtful state of affairs, to have renewed the recognizance of his client for an appearance in the month of May, when the Chief Justice could certainly attend; but, not having any control over the matter, the defense had only to ask that a formal order be entered to the effect that Mr. Davis was relieved from attendance, and had leave to depart from the court until the day named.

Mr. Evarts remarked that it would be quite as inconvenient for the government and its counsel to be unable to proceed at the adjourned day, as it could be to the prisoner and his advisers. He suggested, that by being able to form a timely anticipation as to whether the day named would be such, in view of the actual course of the business of the Supreme Court, as to permit of the attendance of the Chief Justice here, the danger of the result which had been indicated might be guarded against. If circumstances then appearing should render it unsuitable for the Chief Justice to be expected here in time to go on with the trial, it could very easily be arranged that the attendance of Mr. Davis at a still later day in the present term should coincide with the commencement of the new term of the court, so as not to make any practicable difference. But he anticipated that the government would be able to proceed, and that the Chief Justice would be able to attend in time to dispose of the case at the present term of the court. It would, moreover, probably better suit the convenience of all parties to be present in the early spring for a somewhat prolonged period, than during mid-summer, if it should be a protracted trial.

Judge Underwood expressed entire acquiescence in

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the arrangement proposed on the part of the government, as the presence of the Chief Justice in the trial of the cause was essential upon various grounds. He approved of the suggestion of the counsel, looking to an understanding by which an attendance of witnesses and counsel might not be required until the trial was to proceed on the day appointed. He believed it to be due to the defendant that two judges should preside at the trial, as in that case the defendant would have the advantage of appeal to the higher court, in case of a disagreement between the judges upon any important question. The proposition on the part of the government, and assented to by defendant's counsel, was agreeable to the court, and the order proposed by defendant's counsel would be entered.

Some further remarks were made by counsel in regard to the possible necessity of the removal of the leave of absence given to Mr. Davis, and his being held on his recognizance, in the event of the trial of the cause being informally postponed from the time fixed to a more distant day.

Mr. Everts said that if, for instance, on the tenth of March, it should be known that the Supreme Court would prolong its session into April, then if this court, on the motion of the District Attorney, and with the attendance of Mr. Davis' counsel resident in Richmond, would make another order, that the defendant attend on the tenth day of May, for instance, all would be regular, the recognizance would be binding, and no inconvenience would arise.

Judge Underwood replied that the court would take care of the rights of the defendant, and suggested that the necessary order in the case should be drawn by the counsel.

The following order of the court was then agreed upon by the counsel on both sides :

The United States v. Jefferson Davis.—The coun-

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sel having been heard in this case for the United States and for the defendant, it is now ordered that defendant have leave to depart hence until the fourth Wednesday of March next, at ten o'clock in the forenoon of that day, at which day and hour he is required personally to be and to appear in this court, according to the conditions of his recognizance.

At the March term, 1868, of the court on the twenty-sixth day of the month, a new bill was found against Mr. Davis, as follows :

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, AND THE DISTRICT OF VIRGINIA.

At a stated term of the Circuit Court, of the United States of America, for the District of Virginia, in the Fourth Circuit, begun and holden at the City of Richmond, within and for the district and circuit aforesaid, on the fourth Monday of November, and on the twenty-fifth day of the said month, in the year of our Lord one thousand eight hundred and sixty-seven, and continued by adjournment to the twenty-sixth day of March, one thousand eight hundred and sixty-eight.

The Grand Jurors of the United States of America, in and for the district of Virginia, upon their oaths and affirmations respectively do find and present, that Jefferson Davis, late of the city of Richmond in the county of Henrico, and district of Virginia, gentleman, being a citizen and inhabitant of and residing within the said United States, under the protection of the laws of the said United States, and owing allegiance and fidelity to the said United States, not being mindful of his said duty of allegiance, and wickedly devising and intending the peace of the United States to disturb, and to excite and levy war against the said United States, on the first day of June, in the year one thousand eight hundred and sixty-one, at Richmond aforesaid, did unlawfully and traitorously collect and assist in collecting, great numbers of persons armed, equipped, and organ-

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ized as military forces, for the purpose of levying war against the said United States, and did assume the command-in-chief of said forces, and with the said forces did unlawfully and traitorously take forcible possession of said city of Richmond, and said county of Henrico, and did by force of arms exclude therefrom all authority of said United States, and all persons acting under the same, and did, with said forces, occupy the said city and county and exclude therefrom the armed forces of the United States, sent by the government of the said United States to maintain the authority of the same in said city and county. And the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say, that the said Jefferson Davis, on the said first day of June, in the year of our Lord one thousand eight hundred and sixty-one, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit this crime of treason against the said United States, against the peace and dignity of the United States of America, contrary to the form of the statute respecting the crime of treason, approved on the thirteenth day of April, in the year one thousand seven hundred and ninety.

And the Grand Jurors aforesaid do further find and present, that Jefferson Davis, late of Richmond aforesaid, gentleman, an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to said United States, did, on the first day of June, in the year one thousand eight hundred and sixty-one, maliciously and traitorously collect, and assist in collecting great numbers of persons armed and equipped, and organized as military forces, for the purpose of levying war against the said United States, and did assume the command-in-chief of said forces, and with the said forces did unlawfully and traitor-

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ously take forcible possession of said Richmond, and said county of Henrico, and did by force of arms exclude therefrom all authority of said United States, and all persons acting under the same, and with said forces occupy the said city and county and exclude therefrom the armed forces of the United States, sent by the government of the United States to maintain the authority of the same in said city and county. And so the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of June, in the year one thousand eight hundred and sixty-one, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the peace and dignity of the United States of America, and contrary to the form of the statute respecting the crime of treason, approved on the seventh day of June, in the year one thousand eight hundred and sixty-two.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that on the first day of August, in the year of our Lord one thousand eight hundred and sixty-two, a great many persons whose names are to the Grand Jurors unknown, to the number of one hundred thousand and more, were assembled, armed and equipped, and organized as military forces, with the usual weapons of war, and were maliciously and traitorously engaged in levying war against the said United States, in said Richmond, in said county of Henrico, and in the district of Virginia aforesaid, and in several States, to wit, the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee, and Missouri. And that the said Jefferson Davis, at Richmond aforesaid, on the said first day of August, being an inhabitant of, and residing within,

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and owing allegiance to the said United States, well knowing that the said military forces, organized as aforesaid, were engaged maliciously and traitorously in levying war against the said United States, did send to and procure for the said forces, munitions of war, provisions, and clothing, and did give to said forces information, counsel, and advice, maliciously and traitorously to assist them in levying war as aforesaid. And so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of August, at Richmond aforesaid, did maliciously and traitorously levy war against the United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that at a place called Manassas, in the said district of Virginia, on the twenty-first day of July, in the year one thousand eight hundred and sixty-one, a great number of persons, whose names to the Grand Jurors are unknown, to the number of fifty thousand, and more, were assembled, armed, and equipped, and organized as military forces, with the usual weapons of war, and were maliciously and traitorously fighting against, killing, wounding and capturing officers and soldiers of the army of the United States, and destroying and capturing munitions and materials of war, being the property of the United States, and were then and there maliciously and traitorously levying war against the said United States, and that the said Jefferson Davis, at said Manassas, on the said twenty-first day of July, maliciously and traitorously did join himself to, and take part and assist by direction, advice and encouragement, the said military forces, then and there levying war

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against the said United States, as aforesaid, and so the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said twenty-first day of July, at Manassas aforesaid, did maliciously and traitorously levy war against the United States, and did commit the crime of treason against the said United States, against the peace and dignity of the United States of America, and contrary to the form of the statute respecting the crime of treason approved on the thirtieth day of April, in the year one thousand seven hundred and ninety.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that the said Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of, and residing within the said United States of America, and owing allegiance and fidelity to the said United States, did at Richmond aforesaid, on the twenty-fifth day of May, in the year one thousand eight hundred and sixty-one, conspire and unite with Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, and with other persons whose names are to the Grand Jurors unknown, to the number of one hundred thousand, to levy war against the said United States, and that then and thereafter, in pursuance thereof, there were assembled and collected together a great number of persons including the said Jefferson Davis, and the said Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahone, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard,

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William H. C. Whiting, Edward Sparrow, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, and the other persons whose names are to the Grand Jurors aforesaid unknown, armed, equipped, and organized as military forces with the usual weapons of war, maliciously and traitorously levying war in the said district of Virginia, and in the State of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Tennessee and Missouri, and that the said Jefferson Davis was selected and appointed by the persons aforesaid as commander-in-chief of the forces aforesaid, and was by the said forces recognized and obeyed as commander-in-chief as aforesaid, and that the said Jefferson Davis, of the city of Richmond aforesaid, on the said twenty-fifth day of May, well knowing that the said military forces were so levying war against the United States, did accept the office of commander-in-chief of the said forces engaged in levying war as aforesaid, and did then and there direct, counsel, assist, and encourage the said forces, and did maliciously and traitorously act as such commander-in-chief of said military forces in the levying of war against the said United States, as aforesaid, and so the Grand Jurors aforesaid, on their oaths and affirmations as aforesaid, do say that the said Jefferson Davis, on the said twenty-fifth day of May, at said city of Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, against the peace and dignity of said United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that on the second day of August, in the year one thousand eight hundred and sixty-four, there were

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collected and gathered together a great many persons whose names are to the Grand Jurors unknown, of the number of one hundred thousand, armed, equipped, and organized as military forces, and as such engaged maliciously and traitorously in levying war against the said United States, and that Jefferson Davis, at Richmond aforesaid, on the said second day of August, being an inhabitant of, and residing within the United States of America, and owing allegiance to the said United States, and well knowing that the said military forces were engaged in levying war against the said United States, as aforesaid, did act as commander of said forces in their levying of war, and did, then and there, appoint one Girardi then acting as captain in said forces, to act as commander of a brigade of said forces so levying war as aforesaid, and did maliciously and traitorously appoint one Mahoney to be Major-General of said forces, so levying war as aforesaid, and did direct one James A. Seddon to examine into the position of certain of said forces, to wit, a regiment of infantry commanded by one William Butler, and to ascertain whether the said Butler could be spared from his said regiment without injury to the service of levying war against the said United States, and so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said second day of August, at said Richmond, being a person owing allegiance to said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present

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that, on the ninth day of February, in the year one thousand eight hundred and sixty-four, at Richmond aforesaid, there were collected and gathered together a great many persons whose names are to the Grand Jury unknown, armed, equipped, and organized as military forces, of the number of one hundred thousand, and as such forces engaged maliciously and traitorously in levying war against the said United States, and that the said forces were then generally known by the name of the Armies of the Confederate States, and that the said Jefferson Davis, on the said ninth day of February, being an inhabitant of, and residing within the United States of America, and owing allegiance to said United States, and well knowing that the said forces were levying war against said United States, was acting as commander-in-chief of said forces, and did then and there maliciously and traitorously, as such commander-in-chief, issue an address to the said forces, in the words and figures following, to wit:

ADJUTANT AND INSPECTOR-GENERAL'S OFFICE,
RICHMOND, February 10, 1864.

General Orders, No. 19.

The following address of the President is published for the information of the army: Soldiers of the Armies of the Confederate States, in the long and bloody war in which your country is engaged, you have achieved many noble triumphs, you have won glorious victories over vastly more numerous hosts, you have cheerfully born privations and toils to which you were unused, you have readily submitted to restraints upon your individual will, that the citizen might better perform the duty of the State as a soldier. To all these you have lately added another triumph, the noblest of human conquests—a victory over yourselves.

As the time drew near when you, who first entered the service might well have claimed relief from your

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arduous labors and restoration to the endearments of home, you have heeded only the call of your suffering country. Again you come to tender your service for the public defense—a free offering which only such patriotism as yours could make—a triumph worthy of you, and of the cause to which you are devoted.

I would in vain attempt adequately to express the emotion with which I received the testimonials of confidence and regard which you have recently addressed to me. To some of these separate acknowledgments were returned. But it is now apparent that a like generous enthusiasm pervades the whole army, and that the only exception to such magnanimous tender will be of those who, having originally entered for the war, can not display anew their zeal for the public service. It is, therefore, deemed appropriate, and it is hoped will be generally accepted, to make a general acknowledgment, instead of successive special responses. Would that it were possible to render my thanks to you in person, and in the name of our common country, as well as in my own, while pressing the hand of each war-worn veteran. I recognize his title to our love, gratitude, and admiration.

Soldiers ! by your will (for you and the people are but one) I have been placed in a position which debars me from sharing your danger, your suffering, and your privations in the field. With pride and affection my heart has accompanied you in every march ; with solicitude it has sought to minister to your every want ; with exultation it has marked your every heroic achievement ; yet, never in the toilsome march, nor in the weary watching, nor in the desperate assault, have you rendered a service so decisive in results as in this last display of the highest qualities of devotion and self-sacrifice which can adorn the character of the war patriot.

Already the pulse of the whole people beats in

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union with yours. Already they compare your spontaneous and unanimous offer of your lives for the defense of your country, with the halting and reluctant service of the mercenaries who are purchased by the enemy at the price of higher bounties than have hitherto been known in war.

Animated by the contrast, they exhibit cheerful confidence and more resolute bearing. Even the murmurs of the weak and timid, who shrink from the trials which make stronger and firmer your noble natures, are shamed into silence by the spectacle which you present. Your brave battle-cry will ring loud and clear through the land of the enemy, as well as our own; will silence the vain-glorious boasting of the corrupt partisans and their pensioned press; and will do justice to the calumny by which they seek to persuade a deluded people that you are ready to purchase dishonorable safety by degrading submission.

Soldiers! the coming spring campaign will open under auspices well calculated to sustain your hopes. Your resolution needed nothing to fortify it. With ranks replenished under the influence of your example, and by the aid of your representatives, who give earnest of their purpose to add by legislation largely to your strength, you may welcome the invader with a confidence justified by the memory of past victories. On the other hand, debt, taxation, repetition of heavy drafts, dissensions occasioned by the strife for power, by the pursuit of the spoils of office, by the thirst for plunder of the public treasury, and, above all, the consciousness of a bad cause, must fall with fearful force upon the over-strained energies of the enemy.

His campaign in 1864 must, from the exhaustion of his resources, both in men and in money, be far less formidable than those of the last two years, when unimpaired means were used with boundless prodigality, and with results which are suggested by the mention

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of the glorious names of Shiloh, and Perryville, and Murfreesboro, and Chickamauga, and the Chickahominy, and Manassas, and Fredericksburg, and Chancellorsville.

Soldiers! assured success awaits us in our holy struggle for liberty and independence, and for the preservation of all that renders life desirable to honorable men. When that success shall be reached, to you,—your country's hope and pride,—under divine Providence, will it be due.

The fruits of that success will not be reaped by you alone, but by your children, and your children's children, in long generations to come, will enjoy blessings derived from you that will preserve your memory ever-living in their hearts.

Citizens—defenders of the homes, the liberties, and the altars of the Confederacy!—that the God whom we all humbly worship may shield you with his fatherly care, and preserve you for a safe return to the peaceful enjoyment of your friends and the association of those you most love, is the earnest prayer of your commander-in-chief.

JEFFERSON DAVIS.

Richmond, 9th February, 1864.

By order :

S. COOPER,

Adjutant and Inspector-General.

—encouraging, conniving and advising the said forces to continue levying war against the said United States.

And so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said ninth day of February, at said Richmond, being a person owing allegiance to said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against the peace and dignity of said United States of

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America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations, do further find and present that, on the fifth day of January, in the year eighteen hundred and sixty-four, there were collected and gathered together a great many persons whose names are to the Grand Jurors unknown, of the number of one hundred thousand, armed, equipped, and organized as military forces, with the usual weapons of war, and as such forces engaged maliciously and traitorously in levying war against the United States in the district of Virginia, and in the States of Georgia and South Carolina, and that the said Jefferson Davis, at Richmond, in the district of Virginia, on the said fifth day of January, being an inhabitant of, and residing within the United States of America, and owing allegiance to said United States, and well knowing that the said forces were levying war as aforesaid, did maliciously and traitorously direct that a large number of said forces, to wit, fifteen thousand men, known as the Local Defense Men, should be sent to defend the country and railroads between Charleston, in said South Carolina, and Savannah, in said Georgia, against the authorities and armies of said United States, and did maliciously and traitorously direct that certain other of said forces, so levying war, as aforesaid, should continue to defend said Charleston against said authorities and armies of said United States, he, the said Davis, at that time acting as commander-in-chief of said forces.

And so the said Grand Jurors, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said fifth day of January, at said Richmond, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States, against

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the peace and dignity of the said United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that, on the fourth day of January, in the year eighteen hundred and sixty-four, there were collected and assembled a great many persons whose names are to the Grand Jurors unknown, and of the number of one hundred thousand, armed, equipped, and organized as military forces, and as such engaged maliciously and traitorously in levying war against the said United States, in the said district of Virginia, and in the State of North Carolina, and within other places within the United States, and that the said Jefferson Davis, at Richmond aforesaid, on the said fourth day of January, being an inhabitant of, and residing within the said United States, and well knowing that the said military forces were engaged in levying war against said United States, as aforesaid, did act as commander-in-chief of said forces in their said levying of war, and did then and there direct that a brigade of said forces should be sent to a place called Goldsboro, in the said State of North Carolina, maliciously and traitorously the said brigade then and there to fight against, kill, wound, and capture the officers and soldiers of the armies of the United States, there employed by the government of the said United States in upholding its authority.

And so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said fourth day of January, at Richmond aforesaid, being a person owing allegiance to the said United States, did maliciously and traitorously levy war against the said United States, and did commit the crime of treason against the said United States; against the peace and dignity of the said

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United States of America, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the United States of America, and owing allegiance and fidelity to the said United States, did on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-five, at Richmond aforesaid, unlawfully, falsely, wickedly, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahoney, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson and F. O. Moore, being persons owing allegiance to the said United States, and divers other persons, to the number of one thousand, whose names to the Grand Jurors aforesaid are unknown, also ownig allegiance to the said United States, in and to, then and there, unlawfully, falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against the said United States, with the intent then and there to subvert the power thereof, and the said Robert E. Lee, together with the said other persons unknown to the Grand Jurors aforesaid, and the said Jefferson Davis, did then and there so unlawfully, falsely, wickedly, maliciously, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against the said United States of America, and the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as the said other persons unknown to the Grand Jurors aforesaid, confederates in pursu-

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ance of said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there collected large armies, constituting together one hundred thousand men and more, to levy and carry on war against the said United States.

And the said Jefferson Davis, then and there falsely, wickedly, maliciously, and traitorously, and unlawfully commanded to make and carry on war upon and against the said United States, and the said armies did then and there, in obedience to the said command of the said Jefferson Davis, levy and carry on war upon and against the said United States, and the said Jefferson Davis then and there, to wit, on the said twenty-fifth day of March, did order, direct, and command the said Robert E. Lee, and the said other persons known as well as the said other persons unknown to the Grand Jurors aforesaid, to assault, fight, wound, and capture, and kill the said officers and soldiers in the military service of the said United States, the said officers and soldiers being then in a fortification and fort known as and called Fort Steadman, which said fortification and fort was at and near the city of Petersburg, in the District of Virginia, within the jurisdiction of the court, and then was in the possession and occupancy of the said United States ; and the said Robert E. Lee, and the said other persons known as well as said persons unknown, to the Grand Jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, and capture, and kill the said officers and soldiers in the military service of the said United States, in the said fortification and fort.

And so the Grand Jurors aforesaid, upon their oaths and affirmations, do say that the said Jefferson Davis, on the said twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-five, at the said city of Richmond, being a person owing allegiance

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to the said United States, did, contrary to the duty of said allegiance, unlawfully, wickedly, falsely, maliciously, and traitorously levy war against the said United States, as aforesaid, and did then and there so commit one and more overt acts of treason against the said United States, as aforesaid, against the peace and dignity of said United States, in contempt of the laws, in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the said United States, and owing allegiance and fidelity to the said United States, did, at the city of Richmond aforesaid, on the thirty-first day of March, one thousand eight hundred and sixty-five, unlawfully, falsely, wickedly, and maliciously and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahoney, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to the said United States, and divers other persons to the number of one thousand, whose names are to the Grand Jurors aforesaid unknown, also owing allegiance to said United States, in and there and then falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against said United States, with the intent then and there to subvert the power thereof; and the said Robert E. Lee, together with the said other persons known as well as the said other persons unknown to said Grand Jurors, and the

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said Jefferson Davis, did then and there so unlawfully, falsely, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against said United States, and the said Jefferson Davis, and the said Robert E. Lee, and the said persons known as well as said persons unknown to the Grand Jurors aforesaid, confederates, in pursuance of the said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there called large armies constituting together one hundred thousand men and more, to levy and carry on war against said United States.

And the said Jefferson Davis, then and there falsely, wickedly, and maliciously and traitorously commanded armies to levy, make, and carry on war against said United States, and the said armies did then and there, in obedience to said command of said Jefferson Davis, levy and carry on war against said United States, and the said Jefferson Davis, then and there, to wit, on the said thirty-first day of March, did order, direct, and command said Robert E. Lee, and the said other persons known as well as said persons unknown to the said Grand Jurors aforesaid, to assault, wound, capture, and kill the officers and soldiers of said United States, then being in martial array at and near Dinwiddie Court-house, in the county of Dinwiddie, and district of Virginia aforesaid, and within the jurisdiction of the court; and the said armies so collected by the said Jefferson Davis as aforesaid, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the Grand Jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, and capture, and kill the said officers and soldiers in the said military service of the said United States, and so the Grand Jurors aforesaid, upon their respective oaths and affirmations aforesaid, do say that

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the said Jefferson Davis, on the said thirty-first day of March, one thousand eight hundred and sixty-five, at the said city of Richmond, being a person owing allegiance to said United States, did, contrary to his duty of his said allegiance, unlawfully, falsely, wickedly, maliciously, and traitorously levy and carry on war against said United States as aforesaid, and aid them, and did then and there, so become, and was guilty of treason against the United States aforesaid, against the peace of the said United States, in contempt of the laws, in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of and residing within the United States of America, and owing allegiance and fidelity to said United States, did, at the city of Richmond aforesaid, on the first day of April, in the year of our Lord one thousand eight hundred and sixty-five, unlawfully, falsely, wickedly, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahoney, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to said United States, and divers other persons to the number of one thousand, whose names to the Grand Jurors aforesaid are unknown, also owing allegiance to the said United States, in and to, then and there, unlawfully, falsely, wickedly, maliciously, and traitorously combining and confederating together to levy war against said United States, with the intent

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then and there to subvert the power thereof, and the said Robert E. Lee, together with said other persons known as well as those unknown to the Grand Jurors aforesaid, and the said Jefferson Davis, did then and there, so unlawfully, falsely, traitorously, maliciously, combine and confederate together for the purpose of making war against said United States, and did then and there levy war against the United States as aforesaid. And the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the Grand Jurors, confederates, in pursuance of the said unlawful, false, wicked, malicious, and traitorous combination and confederation, then and there collected large armies, constituting one hundred thousand men and more, to levy and carry on war against said United States. And the said Jefferson Davis, then and there, to wit, on the said first day of April, did order, direct, and command said Robert E. Lee, and the said persons known as well as said persons unknown to the Grand Jurors aforesaid, to assault, wound, fight, capture, and kill the officers and soldiers in the military service of said United States, then being in martial array for the defense of the authority of said United States, at and near a place known and called the Five Forks, in the District of Virginia aforesaid, and within the jurisdiction of this court, and the said armies so collected by the said Robert E. Lee, and said other persons known as well as said other persons unknown to the Grand Jurors aforesaid, in obedience to the command of the said Jefferson Davis, did then and there assault, fight, capture, and kill the said officers and soldiers in the said military service of said United States.

And so the Grand Jurors aforesaid, on their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said first day of April, one thousand eight hundred and sixty-five, at the said city of Rich-

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mond, within the jurisdiction of this court, being a person owing allegiance to the said United States, did, contrary to his duty of said allegiance, unlawfully, maliciously, and traitorously levy and carry on war against said United States as aforesaid, and did then and there so become, and was guilty of treason against said United States, as aforesaid, against the peace of said United States, in contempt of the laws and in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present, that Jefferson Davis, late of the city of Richmond aforesaid, gentleman, being an inhabitant of, and residing within the United States of America, and owing allegiance and fidelity to said United States, and at the city of Richmond aforesaid, on the second day of April, in the year of our Lord one thousand eight hundred and sixty-five, unlawfully, maliciously, and traitorously counsel and abet Robert E. Lee, Judah P. Benjamin, John C. Breckinridge, William Mahoney, Henry A. Wise, John Letcher, William Smith, Jubal A. Early, James Longstreet, Daniel H. Hill, Ambrose P. Hill, Gustave T. Beauregard, William H. C. Whiting, Edward Sparrow, Samuel Cooper, Joseph E. Johnston, John B. Gordon, Claiborne F. Jackson, and F. O. Moore, being persons owing allegiance to said United States, and divers other persons owing allegiance to said United States, to the number of one hundred thousand, whose names are to the Grand Jurors unknown as aforesaid, in and to, then and there unlawfully, falsely, maliciously, and traitorously combining, confederating together to levy war against said United States, with intent then and there to subvert the power thereof, and the said Robert E. Lee, together with said other persons known as well as the said other persons unknown to said Grand Jurors, and the said Jefferson

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Davis, did, then and there, so unlawfully, falsely, maliciously, and traitorously combine and confederate together for the purpose aforesaid, and did then and there levy war against said United States.

And the said Jefferson Davis, and the said Robert E. Lee, and the said other persons known as well as said other persons unknown to the Grand Jurors aforesaid, confederates, in pursuance of the said unlawful, false, and malicious and traitorous combination and confederation, then and there collected large armies, constituting one hundred thousand men and more, to levy and carry on war against said United States, and the said armies did then and there, in obedience to the said command of said Jefferson Davis, levy and carry on war upon and against said United States, and that the said Jefferson Davis, then and there, to wit, on the said second day of April, did order, direct, and command said Robert E. Lee, and said other persons known as well as said other persons unknown to the Grand Jurors aforesaid, to assault, capture, and kill the said officers and soldiers of said military service of said United States, then being in martial array for the defense and authority of said United States, at and near the city of Petersburg, in the said district of Virginia, and within the jurisdiction of this court.

And the said armies so collected by the said Jefferson Davis, and by the said Robert E. Lee, and by the said other persons known as well as the said other persons unknown to the Grand Jurors aforesaid, in obedience to the command of said Jefferson Davis, did then and there assault, fight, wound, capture, and kill the said officers and soldiers in said military service of said United States.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said Jefferson Davis, on the said second day of April, one thousand eight hundred and sixty-five, did, at the said city

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of Richmond, and within the jurisdiction of this court, being a person owing allegiance to said United States, contrary to his duty of allegiance, unlawfully, falsely, and maliciously and traitorously levy and carry on war against said United States as aforesaid, and did, then and there become guilty of the crime of treason against said United States, in contempt of the laws, and in violation of his duty of allegiance, and contrary to the form of the statute in such case made and provided.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find and present that the said Jefferson Davis, on the twenty-fifth day of May, in the year eighteen hundred and sixty-one, and continuous thereafter until the tenth day of May, in the year eighteen hundred and sixty-five, was a person fleeing from justice within the intent and meaning of the statute of the United States of America in such case made and provided ; and that on the twenty-fifth day of May, eighteen hundred and sixty-one, there was a rebellion against the said United States, which continued for several years, to wit, until the tenth day of May, eighteen hundred and sixty-five, and that during the whole period of said rebellion by reason of the resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings, process for the commencement of any action, civil or criminal, against the said Jefferson Davis, or for his arrest, could not be served, and the said Jefferson Davis could not, by reason of such resistance of the laws, and such interruption of such judicial proceedings be arrested, or served with process for the commencement of any action, civil or criminal, within the intent and meaning of the statute of the United States in such case made and provided.

March 26th, 1868.

L. H. CHANDLER,
United States District Attorney for Virginia.

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This indictment found on testimony of—
 Robert E. Lee, Lexington, Rockbridge County,
 Va.
 James A. Seddon, Dover Neighborhood, Goochland
 County, Va.
 Charles B. Duffield, Duke street, city of Norfolk.
 John Letcher, Lexington, Rockland County, Va.
 George Wythe, Munford, near Gloucester Court
 House, Gloucester County, Va.
 John B. Baldwin, City of Stanton, Va.
 Charles E. Wortham, 110 Fifth street, Richmond, Va.
 Thomas S. Hayward, Cary street, between First and
 Second, Richmond, Va.

At the same term an order was entered continuing his recognizance until Saturday, the second day of May next, and on that day a new one was entered into by the same parties, in the same amount, for his appearance on the first Monday in May, the day after but one, it having been set by agreement to be tried at a special session of that term, to be held in June. On the twenty-eighth of May this agreement was filed in the cause.

CIRCUIT COURT OF THE UNITED STATES FOR THE
 DISTRICT OF VIRGINIA.

The United States

against

Jefferson Davis.

This case will not be called for trial on the third day of June next, but counsel will then appear on behalf of the United States, and also on behalf of the defendant, and an order will then be entered by consent in the form heretofore used in this case, giving the de-

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fendant time to appear until such day in the month of October next as may be agreeable to the court.

New York, May 28, 1868.

WM. M. EVARTS,

Of counsel for the United States.

CH. O'CONOR,

Of counsel for defendant.

Accordingly, on the twenty-third day of June, an order of continuance was entered, and a new recognizance in the same amount, by the same parties, was given conditioned for the appearance of Mr. Davis on the fourth Monday of next November, at the term of the court then to be held.

While these various proceedings were being had, the Congress of the United States had amended the Constitution of the United States by forcing the late Confederate States to accept certain amendments proposed by it, refusing to allow them any rights under the laws until they had so agreed to the propositions submitted to them. In this way Congress secured the vote of states sufficient to accept constitutional amendments, and thus actually changed the organic law for states which had always adhered to the Union, and which protested against the change, by the votes of states held under martial law, and which were made at the point of the bayonet to repeat the words required of them. Thus the lately loyal states made the constitution for the states always loyal. Among these amendments was the one imposing perpetual disfranchisement for aiding in rebellion, after having held certain offices.

As soon as this amendment was declared adopted in the ambiguous language of the Proclamation announcing the fact, or the hypothetical fact (it declared that if the votes of the late Confederate States were to be considered binding, and if the other states had no right to retract their ratification of the amendment,

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then it was ratified and adopted—otherwise not) the counsel for Mr. Davis prepared to attack the prosecution pending against him on the grounds disclosed in the following proceedings, which the reporter understands were inspired and suggested from the highest official source—not the President of the United States.

It was arranged that the Chief Justice should attend the court at the November term, 1868, and hear the argument on the motion to quash or dismiss the prosecution.

On the thirtieth day of that month, Robert Ould, Esq., one of Mr. Davis' counsel, filed the following affidavit:

On this thirtieth day of November, 1868, Robert Ould personally appeared in open court, and, being sworn, made oath that defendant, Jefferson Davis, was in the year 1845, previous to the alleged commission of the offenses set forth and charged in said indictment, a member of the Congress of the United States, to wit, a member of the House of Representatives of the United States from the State of Mississippi in said Congress, and as such the said Jefferson Davis did, on the eighth day of December, 1845, take an oath to support the Constitution of the United States.

On filing the above affidavit, the counsel of Mr. Davis obtained a rule on the Attorney for the United States, to show cause why the indictment should not be quashed.

On Thursday December 3d, a hearing was had on this rule. Robert Ould, Esq., of Richmond, Charles O'Connor, Esq., of New York, Hon. William B. Reed, of Philadelphia, and James Lyons, Esq., of Richmond, appeared for the defendant. District-Attorney S. Ferguson Beach, Richard H. Dana, Jr., Esq., of Boston, and General H. H. Wells, represented the government of the United States. The court-room was

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filled with auditors, among whom were General Stoneman, other Federal officials, and many ladies.

When the case was called, Mr. Beach stated to the court that a pressure of official duties rendered it impossible for the Attorney-General to be present. He asked that a written statement be filed specifying the grounds upon which the motion to quash was based. His own connection with the case was slight and recent, and the special counsel for the government having had short notice, had given it little attention. It was probable that after the defense had opened the argument, it might be necessary for himself and learned associates to ask time to prepare their reply.

Mr. O'Connor assumed that there was no necessity of making any formal reply. The counsel for the government had been fully informed by his associate, Judge Ould, of the grounds relied upon.

The Chief Justice said the suggestion of the District Attorney was that no formal statement of the reasons for the motion had been filed with the clerk. The court had supposed that such a statement was filed ; and certainly it should have been done.

Mr. O'Connor thought the affidavit on file contained all that was necessary to advise counsel of the grounds assumed by the defense. All the material facts were stated therein, to wit, that Jefferson Davis had been a member of the Senate, had taken the prescribed official oath to support the Constitution of the United States, and had afterwards engaged in the rebellion. They clearly indicated the grounds of the motion. The moment *Mr. Davis'* counsel determined to make the motion, the Attorney-General was informed of the fact by a note addressed to him, the point to be made being concisely stated ; and a due apology was also tendered for the shortness of the notice. That note was received on Friday last, and was duly acknowledged on behalf

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of the government by Mr. Evarts, the special counsel in the case. He then made no complaint of any insufficiency in the notice in any respect. A single point was presented, and that rested on facts admitting of no prolixity in statement. In fact the Attorney-General had had notice which though informal was satisfactory to him, several days before the matter was first mentioned in court.

Mr. Dana did not understand for what purpose the learned counsel had just addressed the court, if he did not object to the suggestion made by the District Attorney. On Monday last he had been first informed by telegram that his presence here was desired, to show cause why the indictment against Mr. Davis should not be quashed. When he reached Richmond he had inquired for the ground of the motion, and found only an affidavit setting forth that Jefferson Davis had been a member of the Congress of the United States, in 1845 ; and in that capacity had taken an oath to support the Constitution of the United States. He did not see that this had anything to do with the indictment, yet the motion to quash must be founded on the indictment. If the defense wished the benefit of the facts stated in the affidavit, they must be either proved or conceded, and then the defense must avail themselves of them by a plea in abatement. The government had no doubt of the facts alleged, and stood ready to admit them, but he insisted that there should be a written statement of the grounds upon which the motion was made, so that the case should be put upon a basis of which counsel should not be ashamed. If any new fact is imparted, we must agree to it, and then be informed what use the defense intend to make of it. In conclusion, Mr. Dana protested that he did not wish any unnecessary delay.

Mr. O'Connor said that the propriety of bringing this matter up by affidavit instead of by special plead-

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ing, was a question to come up hereafter on the merits. But the defense would not object to placing the grounds of their motion on record. Having every desire to accommodate, he would draw up the statement, whilst his learned associate (Judge Ould) opened the case.

The District Attorney (Mr. Beach) expressed a wish that this should be done before the argument commenced.

The Chief Justice said that the court would like to get through with the matter as soon as possible, inasmuch as the Supreme Court was to meet on Monday, and he (the Chief Justice) ought to be in Washington a day or two before that time. The demand, however, for a brief statement of the point made was not unreasonable, and the paper had better be prepared at once.

After a short recess, Mr. O'Connor presented the following statement, and motion :

“CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF VIRGINIA.

“The United States v. Jefferson Davis.

“The indictments in these cases were framed on the alleged fact that the defendant had engaged in the insurrection and rebellion against the United States, known to the court and to the several departments of the government as having existed at the several times mentioned in the said indictment in the State of Virginia and elsewhere, and thereby given aid and comfort to the enemies of the United States engaged in said insurrection and rebellion.

“And the defendant alleges that prior to such insurrection and rebellion, and in the year 1845 he, the said defendant, was a member of the Congress of the United States, and as such member took, in said year, an oath to support the Constitution of the United States in the usual manner, and as required by law in such case.

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“And the defendant alleges in bar of any proceedings upon said indictments, or either of them, the penalties and disabilities denounced against and inflicted on him for his said alleged offense by the third section of the fourteenth article of the Constitution of the United States, forming an amendment to such Constitution.

“And he insists that any judicial proceeding to inflict any other or further pain, penalty, or punishment upon him for such alleged offense is not admissible by the Constitution and the laws of the United States.

“Wherefore he, the said defendant, moves the court now here to quash and set aside the said indictments, or to dismiss the same and the prosecution thereon, or to render such other relief in that nature as the aforesaid facts and circumstances shall require, and as may seem proper.

“CHARLES O'CONOR.

“WILLIAM B. REED.

“ROBERT OULD.

“JAMES LYONS.”

Thereupon Mr. Beach submitted the following reply on behalf of the government :

“United States *v.* Jefferson Davis.

“To enable the court at once to consider and pass upon the question of dismissing this case under the motion above made, with the benefit of facts necessary to such consideration, and which do not appear on the record, inasmuch as the counsel for the United States believe these facts to exist and to be provable, they waive the regular process of plea, and agree that the court may assume as facts, for the purpose of this motion, that Jefferson Davis, in the year 1845, and previous to the alleged commission of the offenses set forth in the indictment, did take an oath as a member of Congress of the United States to support the Consti-

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tution of the United States, and that this agreement shall also be of effect in case the above motion shall be considered by the Supreme Court of the United States.

S. F. BEACH,
United States District Attorney.

“December 3, 1868.”

The Chief Justice.—Both the papers may be filed.

Judge Ould then commenced the argument for the defendant on the motion to quash. He said it was now a concession in the cause brought properly to the notice of the court that Jefferson Davis was in 1845 a member of the United States Congress, and in that capacity took an oath to support the Constitution of the United States. As had been supposed by the learned counsel on the other side, the affidavit filed by the defendant bears an intimate relation to the third section of the fourteenth constitutional amendment, which provides that every person who, having taken an oath to support the Constitution of the United States, afterwards engaged in rebellion, shall be disqualified from holding certain State and Federal offices. Whether this section be of the nature of a bill of pains and penalties, or in the form of a beneficent act of amnesty, it will be agreed that it executes itself, acting *proprio vigore*. It needs no legislation on the part of Congress to give it effect. From the very date of its ratification by a sufficient number of states it begins to have all the effect that its tenor gives it. If its provisions inflict punishment, the punishment begins at once. If it pardons, the pardon dates from the day of its official promulgation. It does not say that Congress shall, in its discretion, prescribe the punishment for persons who swore they would support the authority of the United States and then engaged in rebellion against that authority, but itself pronounces the penalty and inflicts the punishment. For this declaration there

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is the authority of the Supreme Court as laid down in *ex parte Garland*, and in *Cummins v. The State of Missouri* (4 *Wallace*). A majority of the court there held that deprivation from office, in one form or another, couched in civil law or criminal proceedings, is punishment for an offense (4 *Wallace*, 321). The theory of political security rests upon the fact that mankind are endowed with certain inalienable rights,—life, liberty, and the pursuit of happiness,—and any deprivation or suspension of those rights is a punishment, and can be no otherwise defined. This same doctrine is laid down in *ex parte Garland* (4 *Wallace*, page 344), and in the argument of that case counsel referred to numerous authorities to prove the fact that disqualification from office-holding is punishment. Judge Goldthwaite (7 *Porter*, 298) held this ground, and questioned whether any ingenuity could devise a punishment more calculated to operate on the public mind. Spencer, C. J., had remarked that the disfranchisement of a citizen is no unusual punishment for treason. So the very law under which the indictment against Mr. Davis is framed, expressly excludes from Federal offices those who engaged in the rebellion or insurrection.

It might, then, be taken for granted that the third section of the fourteenth amendment does inflict punishment for certain offenses set forth on its face, to wit, having engaged in rebellion after taking an oath to support the Constitution of the United States. The act of 1862 had prohibited those who had committed this offense from holding Federal offices, and this constitutional amendment went still further. It prescribed disqualification from holding State offices; and there is no fact or count in that indictment that is not embraced in the terms of the third section of this constitutional amendment. The question then arises, is this punishment set forth in section three exclusive or

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cumulative. The defendant's counsel hold that it is exclusive, and affords the only rule of punishment in the case of Mr. Davis, who is at this moment suffering under that penalty. The gentlemen on the other side will hardly deny that such a rule of construction must be adopted as will place the amendment in harmony with other parts of the Constitution. Can the third section of this amendment be so construed, without straining it, as to take away from it the sting of being an *ex post facto* law? If there was one construction that would make it an *ex post facto* law, and another that would not, the court should undoubtedly embrace the latter: the construction which makes it beneficent, and makes it harmonize with other provisions of the Constitution. If it be construed that this provision is cumulative, or prescribes penalties in addition to those laid down in the acts of 1790 and 1862, then by every rule of construction it is made an *ex post facto* law. This third section, unlike the others, refers only to past transactions; it has no force whatever upon the participators in any future rebellion. In 4 Wallace, 328, an *ex post facto* law is defined to be one that prescribes additional punishment for crimes committed before its passage. The conclusion is irresistible that if the punishment prescribed is cumulative, this is an *ex post facto* law. But if the punishment is exclusive,—the last expression of the national will on the subject,—it gives the whole punishment, and nullifies all conflicting acts. Then the conclusion that it is *ex post facto* is escaped.

For although punishment may be inflicted by a new law for offenses already committed, if the new law prescribes a lighter punishment it is not an *ex post facto* law. Otherwise, it is a bill of attainder, or at least a bill of pains and penalties, which is a legislative declaration by which a higher punishment is fixed for an offense already committed. Now, if this section is

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construed exclusively, the sting of a bill of attainder is taken away, and it is a matter of mercy instead of a matter of wrath. He asked the court to put the beneficent construction upon it. True, there is no distinct provision in the Constitution that no man shall be punished twice for the same offense ; but there is a principle in the Anglo-Saxon heart, and acknowledged everywhere, which forbids such a monstrous thing. It is not less than a constitutional provision. However slight the punishment may be, when a man receives that he goes free. Jefferson Davis has been punished, and is now undergoing punishment. The law under which he is punished is its own interpreter and executioner, and the District Attorney has nothing to do with it. The punishment, he repeated, is now being inflicted by the voice of the American people, who have tried him and pronounced the sentence that he shall be disqualified from holding any office, State or Federal. Further, this law is a special provision, and supersedes all general provisions with reference to a general object. Before this combination all general statutes, whatever they are, must pass away and not be considered. It is also a constitutional provision. These other enactments are statutes at large made under the Constitution ; this is a specific provision of the Constitution itself. If there is any discrepancy between this and the general act, or if both meet the case, but in a different manner, the statute goes down and the Constitution prevails. It says that the punishment shall be deprivation from office ; the statute says imprisonment. If you enforce the statute you go further than the Constitution provides. But if he was wrong in all this, and if the constitutional amendment is to be degraded into a statute and stripped of its force, he would insist still, that being the last legislative expression of the will of the people, it should prevail. He quoted Leach's Crown cases (volume 1, p. 271, *Rex v.*

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John Davis), to prove that where a statute makes an offense punishable as a felony, and another inflicts a milder punishment, the latter must prevail. Again, every statute repeals all statutes repugnant thereto without a repealing clause. 21 *Pickering*, Commonwealth v. Bery, *Kimball*, 373, &c. ; 5 *Pickering*, Nicholas v. Squire. Another position taken was, that it was the design of the law-makers to make disqualification from office the only punishment for engaging in the late rebellion. Nobody even suggested the punishment of any but the leaders, and very few of them. In the language of Burke, "You can not bring an indictment against a nation." If all who engaged in the rebellion were tried, where could a jury be found? How could a man be convicted without perjury? Everybody was on either one side or the other. How, then, could impartiality be secured? All this was seen, and the plan of selecting for punishment those who had enjoyed the confidence of the people, and led them into rebellion, was settled upon. In this view it was a beneficent enactment; otherwise it was monstrous. When Judge Ould concluded, Mr. Dana inquired what course the court would take in reference to the session.

The Chief Justice said there would be no recess. The court would sit until half-past 3 o'clock, and then adjourn until to-morrow.

Mr. Dana said the counsel for the United States had had no opportunity to confer, and as the motion had been on a point unexpected to them, and probably to the court, they desired time to look over authorities. This was an entirely new proposition in law, for which there is no precedent. Such a case could not arise under any but a written Constitution. It was natural, under these circumstances, that time should be desired for reflection.

The Chief Justice inquired about what agreement

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had been made in regard to the number of speeches on either side.

Mr. O'Connor said that Judge Ould and himself were the only speakers on the side of Mr. Davis.

Mr. Beach asked that he and Governor Wells might be heard for the government that afternoon, and Mr. Dana to-day. This proposition was acceded to, and the court took a recess for an hour.

Before the recess the Chief Justice thought proper to say that the court had not been surprised, as intimated by Mr. Dana, at the ground taken by the defendant. The course of the argument was anticipated, as it was expected that the point to be urged was the common principle of constructive repeal.

Mr. Beach opened the argument in opposition to the motion.

Quoting the terms of the third section of the amendment, and adverting to the defendant as being among the persons designated in the section, he proceeded to combat the essential proposition on which the motion was founded.

This proposition was, that the third section of the amendment had repealed the act under which the indictment was framed. If the act had been repealed, no prosecution, of course, could be maintained under it, but he denied that there had been any such repeal, either in terms, or by implication or upon any justifiable theory as to the purpose and object of the amendment.

There was clearly no express repeal—and having stated the rules and cited the authorities by which the courts are governed on the question of an implied repeal, he maintained that under none of these rules, and on none of these authorities, could the act be regarded as repealed by implication.

There was no conflict whatever between the act and the constitutional provision—no repugnancy, no incon-

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sistency, much less that degree of either essential to an implied repeal.

The amendment prescribed no new or different punishment for having engaged in insurrection or rebellion. To prescribe punishment for crime was not its purpose—was no part of its purpose. It was directed, in the section under consideration, to the end of securing the administration of the government, State and national, in the hands of those who had never been in insurrection against it, and although disabilities were thereby imposed upon the individuals described in the section, this was but the incidental consequence—not the substantive purpose of the amendment.

Surely it was competent for the nation—without thereby declaring impunity for their offenses—to provide, by constitutional enactment, that men who had waged a great but unsuccessful war for its destruction, should not be afterwards admitted to its councils.

Adverting to the history of the period, he argued to show that no such consequence as that assumed was in the mind either of the Congress which proposed, or of the legislatures which ratified the amendment.

The number of persons falling within the category of the third section was a very small one, embracing, however, the originators and prominent actors in the great civil strife—among them, the accused, who was its head and front; was it to be supposed that this class had been singled out by the nation as objects of special and peculiar favor, and that the design was to exempt them wholly from criminal responsibility, while the great crowd of humbler offenders, who had but followed the lead of these, their chiefs, were to be left exposed to fines, forfeitures, and imprisonments?

The ground of the present motion was, that just this discrimination was intended—a discrimination which proclaimed amnesty to the leaders, and denounced

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pains and punishments upon the rank and file of the rebellion.

Such a theory of the amendment was in direct reversal of the known national sentiment in this regard—was repugnant both to the instinctive and deliberate promptings of an enlightened people, and could have no adequate support, except in terms which should admit of no other.

Brought to the test of any standard, whether to the narrower and more technical one to be found in the established rules for the construction of the written law, or to the broader one to be found in the recognized principles which guide and determine the conduct of civilized communities under circumstances like those which brought about the adoption of the constitutional amendment, the proposition on which the motion rested, and the motion itself, must fail.

General H. H. Wells, with the District Attorney.—This motion to quash, separated from what is manifestly irrelevant, rests upon the assumption that the third section of the fourteenth amendment of the Constitution repeals the former laws punishing treason and rebellion. The repeal is not, however, supposed to be contained in any expressly repealing clause or language, but it is claimed that the language of this third section repeals the old law by implication.

How this repeal by implication arises does not appear very clear, even to the acute preception of the learned counsel who opened this discussion. We are justified in saying so, because he builds chiefly, not on the language employed, nor upon any manifest repugnancy between the old law and the new one, but finds it necessary, if we understood his argument, to establish these propositions, and in about this order :

1st. That the third section of the fourteenth amendment is, as to the accused, either a bill of penalties or a pardon.

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2d. That whichever it be, it executes itself, it takes effect from its date, and needs no legislative action to give it effect or force.

3d. Whether it is the one or the other is simply a matter of legal construction.

4th. That the court should give the language employed such a construction as will, if possible, harmonize the old and the new law, such construction should also be given as will render the last provision or enactment free from the objection of being *ex post facto*.

5th. The constitutional provision is inconsistent and incompatible with the old law, and therefore it, by implication, repeals the former enactment.

In discussing only the question of repeal, as is my duty on this occasion, I am at the outset greatly inclined to doubt the correctness of the conclusion arrived at by the counsel, because the repeal he has undertaken to establish is not the clear, natural, or inevitable result and consequence that must follow, because the two enactments are so utterly incompatible that they can not stand together; but it is, on the other hand, the doubtful result of an involved, complicated argument, founded upon many premises, the failure of any one of which is absolutely fatal to all that follows.

Clearly, the section of the Constitution which is referred to, is a bill of penalties, and it is as certainly not a pardon. That it is not a pardon is manifest, because it declares or imposes a disability as the consequence, or as a punishment for doing the act mentioned, and it authorizes a remission of the penalty by Congress—a method of restoration lacking all the distinctive features of a pardon.

That it is not a pardon of the offense of which Mr. Davis stands indicted is evident, because the offense described in the third section is not the same as

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that for which he is indicted. The offense there named is "engaging in insurrection or rebellion against the United States, or giving aid or comfort to the enemies thereof." He is indicted for treason in levying war against the United States.

The offenses are not only totally unlike, but the persons against whom the penalties are declared are not the same. Any citizen who levies and carries on actual war against the United States is guilty of treason, but the pains of the third section are directed only against those who, having previously taken an oath as a member of Congress, an officer of the United States, a member of a State legislature, or as an executive or judicial officer of any State to support the Constitution of the United States, afterwards engaged in insurrection or rebellion.

How, then, can it, for the purposes of this discussion, be material whether or not this constitutional provision executes itself? How would an admission of the fact, either way, touch the question of repeal of the old law? It certainly can not be material either that the true intent and meaning of the statute is arrived at by construction, instead of standing out clearly upon the face of the law. Of this section it is enough to say, that to every man's comprehension it punishes a new offense, and a different class of persons. From the old law ordinarily the language used in the Constitution is, "Congress shall have power," for instance, to punish counterfeiting. Here the Constitution declares the penalty, and authorizes Congress to relieve from it, who? not those who have been tried and found guilty of treason, but those who, deeming themselves disabled from holding office, ask to have their disabilities removed.

It is difficult to disbelieve that this third proposition is not stated mainly to afford an opportunity conveniently to enunciate the one which follows it. It is the

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scaffolding which was designed to support something else, that would not stand by itself. What need is there for raising either of them, for after all the whole substance of the matter is embraced in the fifth statement, to wit, that the third section of the fourteenth amendment is incompatible with the old law, and therefore the latter must yield to it. The only pertinent inquiry is, Are they incompatible? If there is no such incompatibility the discussion is at an end—both the law and the Constitution stand.

The substantial questions of law presented here, are by no means novel or difficult, and would perhaps, be agreed to by us all—they may be conveniently stated thus.

An indictment can not be sustained upon a statute which has already been repealed, unless the repealing act contains a saving clause.

That the declaring of a less penalty for the same offense, operates as a repeal of the old penalty.

To both of these propositions I certainly cordially assent—and they are in fact abundantly supported by the highest authority, and the soundest reason. It is, however, only necessary in their support to say that, in the very nature of things, no person can be punished for a statutory offense, unless, at the very moment when sentence is pronounced upon him, the statute itself exists in full force and vigor.

On the other hand, it is also as evident that the statute under which the accused stands charged has not been repealed in terms, but if repealed at all it is by implication only. That the repeal of statutes by implication is not favored. There must be a positive repugnance between the provisions of the new law and the old to work a repeal by implication.

16 *Peters*, 342; 1 *Blatchford*, 66, 459; 2 *Wol., Jr.*, 66, 368; *Crabb*, 66, 356; S. C., 3; *How.*, 197; 1

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Blatch., 66, 609. *Sedgwick on Statutory Law*, 123, *et seq.* ; 13 *Howard*, 429.

We maintain confidently that between the statutes under which this indictment was found, and the third section of the fourteenth amendment, there is no repugnance—nor could there be any, by any possible construction of the two.

Because,

1st. The offenses are not the same. One is treason requiring an overt act of levying war to constitute it ; the other is insurrection or rebellion, which may be committed by simply giving counsel to enemies or others raising insurrection.

2nd. The third section of the amendment only deprives one class of persons—those who for a certain purpose, have taken a certain oath—of one privilege, that of office-holding.

It not unfrequently occurs that by the doing of one act two offenses are created ; for instance, burglary and larceny—would it be maintained that a statute which repealed a former statute punishing such a burglary, as a burglary, would also by implication repeal the other statute that defined and punished the larceny as a larceny. The truth is, that the two offenses are perfectly distinct. A person might be guilty of one, and not guilty of the other—or the same acts may constitute both offenses, as where one who had, after taking an oath as a member of Congress to support the Constitution, afterwards engaged in insurrection and rebellion, and in doing so, had also levied war against the United States, and thus committed treason. He would thereby be guilty of two offenses, punishable one capitally, and the other by a political disability. In such a case—and it is this case—the two statutes stand well together, and there is neither inconsistency nor incompatibility. The constitutional provision does not repeal the old law.

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Richard H. Dana, Jr., for the United States.—The defendant is indicted for treason by “levying war” against the United States. By the Constitution, Article III., Section three, treason can be committed in but two ways—one, the actually levying war against the United States; and the other, the adhering to their enemies, “giving them aid and comfort.”

Since the case of the United States *v.* Cheneweth, 1 *West. L., Mo.*, 165, it has been assumed that giving aid and comfort to rebels in arms against the government in a civil war, does not come within the second branch of treason, and the defendant is not indicted for anything less than the actual levying of war. Nothing, therefore, can be a defense to this indictment, unless it is a denial of the levying of war, or is a bar to proceedings against the defendant for that exact offense.

The pleadings and arguments before the court established the fact, for the purposes of the opinion of the court, that Jefferson Davis had taken the oath as a member of congress, and, while such member, “engaged in insurrection and rebellion” against the United States. It is contended that Article XIV., Sec. 3, of the amendment of the Constitution is a bar to any further proceedings against the defendant on this indictment for treason. The position taken by the defendant’s counsel is that by the effect of this amendment, the defendant has already suffered punishment or a penalty for the act charged in the indictment. The part of the amendment relied upon is as follows: “No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress or as an officer of the United States, &c. . . . to support the Constitution of the United States, shall have engaged in insurrection or

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rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability." The fifth section of the article of amendment is as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is conceded by the counsel for the defendant, that Congress has not provided any method of proceeding against a person under section three of this amendment, or of ascertaining or declaring any disability affecting any individual thereunder; and, of course, it is further conceded that there have been no proceedings against the defendant of any character whatsoever—judicial, legislative, or executive—under that section.

On such a concession there is no position left to the defendant except to argue that the amendment of the Constitution executes itself by the mere fact of its existence on every person who may come within its scope. But even this is not enough. It is further necessary for the defendant to contend, and his counsel does contend, that the adoption of that amendment by the people is a repeal of the statutes against treason in force when it was adopted, as to all persons who come within its terms.

Upon this statement it appears that there are two questions for the court:—First, Does amendment XIV. inflict a punishment or penalty, in the sense of the criminal law, so as to come within the category of criminal statutes?

Second, If it does inflict a punishment in that sense, is it for the offense of treason by levying war, so as to repeal the penalties in the statute against treason?

First, The fourteenth amendment is not a mere provision of a criminal law to punish individuals for offenses. It is a permanent addition to our organic

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political system, for the purpose of securing fidelity in the administration of office.

It is highly improbable that the people would put into the Constitution mere punishments and penalties on individuals, to take effect by the force of the Constitution itself, without judicial proceedings, for the purpose of ascertaining the guilt of the party. It is far more probable that the purpose of a constitutional provision would be a general permanent provision respecting classes of persons entitled to hold office. The Constitution establishes many disqualifications for office, as of age, foreign birth, &c., showing that the whole people are not willing to leave the selection of offices entirely to the discretion of a majority of voters in a locality, as to the particulars specified. Disqualifications have also been established by Congress, as in the case of a person attempting to corrupt a judge, or guilty of certain frauds upon the revenue. The act of 1862, chap. 195 (12 *Statutes*, 590), provides that every person guilty of either of the offenses described in that act shall be forever disqualified to hold any office under the United States; and the offenses specified are treason, and rebellion or insurrection; and for each offense the usual criminal punishments—death, imprisonment, and fine—are provided. Suppose that by one act of Congress certain high crimes of a political character were declared, and specific punishments provided for each, as death or imprisonment. Suppose a subsequent statute should provide that no persons convicted of any of those crimes should hold certain political offices specified. Could it be seriously contended that the latter statute repealed all the penalties of the prior statute? Suppose a statute should now be passed that no person guilty of pecuniary frauds in office should be qualified to hold any office of pecuniary trust, for a certain time. Would any court decide that the statute repealed all penalties for pecuniary frauds by officers?

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Would it not be far more reasonable to hold that the statutes declaring disqualifications were political, and not criminal? But the argument is far stronger in the case of a provision in the Constitution, permanent in its character, claimed to operate by its own force.

There are some things in the language of the amendment which should be considered. The phraseology is not that of penal or criminal law. It does not say that persons guilty or convicted of certain offenses shall be disqualified. The phraseology is that of a general provision of public policy—"No person shall be a senator, &c. . . . who, having previously taken an oath as a member of Congress, &c. . . . shall have engaged in insurrection or rebellion." Moreover, not only is there no word of criminal or penal law used, as "guilty" or "convicted," but the amendment denominates its consequences a "disability." "Congress may, by a vote of two-thirds of each house, remove such disability. If, then, the court will consider, first, the probabilities arising from the fact that this provision is found in the organic law; second, the necessity of providing in the organic law for qualifications for office; and lastly, the phraseology of the amendment, we respectfully submit that it can come to no other conclusion than that the amendment, in this respect, establishes certain disqualifications for certain offices as part of our political system, and was not intended by the people to interfere with existing criminal and penal provisions of the statutes. Probably nothing would more surprise the people of the United States than to learn that, by adopting Amendment XIV., they had repealed all the penalties against treason, insurrection, or rebellion.

The construction contended for by the defendant is made extremely improbable by another consideration. Its effect would be to relieve persons holding high office, and therefore the more guilty, from the penalties

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of death or imprisonment, and leave those penalties in full force against all persons engaged in a rebellion who did not at the time hold public office. It is in the highest degree improbable that the people have established a discrimination so unjust and absurd.

It will also be observed that there is nothing in the amendment making it solely retroactive. On the contrary, it is clearly a permanent provision, prospective as well as retrospective. The effect of the construction contended for would be that, in all future rebellions or insurrections, no office holders under a State or the nation could be punished in any other way than by disqualification for holding certain offices, while all persons not holding office when they engaged in the rebellion would be left subject to any penalties provided, or that might afterwards be provided, for such crimes.

It is also worthy of consideration by the court that while the Constitution confers the power of granting pardons for offenses against the United States solely upon the president, the "disqualification" proposed by this amendment, is left to be "removed" by a vote of Congress.

It has been contended that disqualification for office is a punishment in the sense of the criminal law. In support of that position the counsel have cited *ex parte Garland*, 4 *Wallace*, 333, and *Cummings v. Missouri*, *Id.* 277. But in those cases the court said nothing inconsistent with our position. On the contrary, the opinions seem to assume that disqualifications touching merely the tenure of public office are not necessarily penal, and the court held that the disqualifications in those cases were penal, because they affected men in the ordinary pursuits of life as private citizens. Indeed, disqualifications for office have no necessary connection with crimes or penalties. The accidents of birth or age impose disqualifications as serious as those which result from fault. It is entirely competent

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for the people to declare that persons found in certain predicaments shall be deemed unfit to hold certain offices. Public good may require such a provision, whether the person's being in the given predicament is or is not the result of misconduct; and, if it be the result of misconduct, there is no reason why the guilty person should not also be punished by the usual criminal penalties.

Another objection is that if the amendment inflicts a criminal punishment, and operates upon this defendant, it is *ex post facto*; and, as there are no judicial proceedings, it is subject to the objections which exist against bills of attainder, and bills of pains and penalties. It is not to be presumed that the people made provisions of that character.

Second. Assuming that Amendment XIV. does inflict a criminal penalty retroactively and by its own force—the question remains whether it necessarily touches the crime of treason by levying war, so as to repeal penalties for that offense.

There is no constructive repeal of penalties unless the offense is identical, and there is a positive repugnance between the last and the former penalties, or they are irreconcilably inconsistent.

Repeals by implication are not favored, and new provisions of law are presumed to be cumulative, auxiliary or otherwise, and not to operate as repeals. *Wood v. United States*, 16 *Pet.* 342, 362; *Aspden's Estate*, 2 *Wallace*, 368; *Davies v. Fairbank*, 3 *How.* 636; *McCool v. Smith*, 1 *Black*, 459; *Harden v. Gordon*, 2 *Mason*, 540; *Harford v. United States*, 8 *Cr.*, 109; *Sedgwick Stat. & Cons. Law*, 127; 1 *Bishop Cr. Law*, § 197, *et seq.*

But the Amendment XIV. and the statutes against treason do not relate to the same offense. The words "treason," "levying war," are among the most ancient phrases of political criminal law, introduced

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into our system at the beginning, and having an established judicial and legislative construction. The amendment avoids both those phrases, *ex industria*, and selects other phrases the construction of which is equally well settled, viz., "insurrection or rebellion," and "giving aid and comfort to the enemies."

Although treason by levying war, in a case of civil war, may involve insurrection or rebellion, and they are usually its first stages, they do not necessarily reach to the actual levying of war. The act of 1793, ch. 36 (1 *Stat.* 424), assumes that parties may be in a state of insurrection, and be treated as insurgents, before the president can issue a proclamation requiring them to retire to their homes before a time named; and it is only after disobedience to that proclamation that he can use the militia or land or naval forces against them. In the Prize Causes, 2 *Black*, 635, it was decided that in the case of an instant levying of war, where the parties did not rest at the stage of mere insurrection or rebellion, the president might use the land or naval forces at once. In the same case, it was decided that, if the acts of the parties concerned amounted, in extent and character, to a levying of war against the United States, the government, in all its branches, might resort to blockade, and the search of neutral vessels on the high seas, as in the case of a war *inter gentes*; and this levying of war was fully recognized by the nations of Europe as establishing a status of belligerency on the high seas. It can not be supposed that all these powers would be developed, and all these rights exist, from the mere fact that the acts of parties amounted in law to "insurrection or rebellion," if they did not advance to the stage of actual levying of war. Nor is the levying of war any less treason, or to be regarded by the judiciary as anything else than treason, because its first developments may have been rebellious and insurrectionary in their character. The acts of 1861

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and 1862 (12 *Stat.* 284, 589), recognized the distinction in the most complete manner; and for treason, which requires a levying of war to exact the penalty of death, or of imprisonment not less than five years, and fine not less than ten thousand dollars; while engaging in "insurrection or rebellion" is punished by imprisonment not exceeding ten years, or fine not exceeding ten thousand dollars, or both. The judicial department of the government has recognized this distinction, and has treated several cases of insurrection with armed force as not cases of "levying war" (United States *v.* Hoxie, 1 *Paine*, 265; United States *v.* Hanway, 2 *Wallace, Jr., & Grier, J.*, in the Prize Causes, 2 *Black.* 635).

There is another respect in which the amendment and the statutes against levying war are *diverso intuitu*. The offense to which the amendment refers is the breach of the official oath and duty, by the engaging in rebellious acts after taking the oath of office. The oath and the holding are of the essence of the offense. The statutes against levying war have no reference to official duty, and the indictment in this case does aver that the defendant held an office, or had taken an oath of office.

On the whole, we respectfully submit that the true construction of the fourteenth amendment is, that the people of the United States have, as a part of their political system, established a rule that certain offices shall not be filled by persons who, having once filled them, have broken their oaths by joining in insurrection or rebellion, whether they have or have not actually levied war against the United States, in the sense of the criminal law; and that this general provision of a political and organic character is not inconsistent with, and does not repeal criminal and penal statutes respecting treason by the levying of war.

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Mr. Dana was followed by *Mr. O'Connor*, who closed the argument for the defendant.

He said: This motion has been met in a manner which reflects credit upon the government, its officers, and their associates. No facts are denied; no forms or special pleadings are insisted upon, nor are any technical impediments whatever interposed. By their consent a great judicial question is withdrawn from the inappropriate forum to which misconceptions had attempted to consign it. It was presented to the proper tribunal at a time and place, and under circumstances well calculated to secure a just solution. This tribunal is the highest which could take cognizance of the case, and its presidency is occupied by the foremost of our judicial magistracy. These facts unite with cherished reminiscences to dignify the occasion. This State gave birth to Washington, the Father of our Republic; and here in its capital city, and in this very court, sat in judgment the most renowned and revered of our past Chief Justices, when as an oracle to guide his own and succeeding times, he gave the first practical illustrations of American law concerning treason. In these aspects the venue is fortunate, whilst in any other it would have been most unfit. Some who are wholly incompetent to deal with such questions, or to comprehend the necessities of a transaction greatly peculiar and exceptional, would not have allowed the forensic debate now in progress. They would fain have enacted here an absurdly grotesque drama. They would have impanelled twelve Virginians as a jury for the investigation of disputable facts, requiring them to hear proofs, attentively to consider arguments thereon, and gravely to respond on oath to the inquiry whether Jefferson Davis had participated in the great territorial civil war recently pending in the State, of which he was the known and acknowledged chief. When it is considered that the hostile territory embraced the

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entire length and breadth of the State, and impressed upon all its inhabitants for the time, including the jury themselves, the character of public enemies to the government, no commendation can be deemed too high for the enlightened resolve which has rescued our jurisprudence from the stigma of tolerating such a procedure. That resolve on the part of the government's law advisers is itself a concession that such indictments as those before you are not sustainable. It is persuasive evidence that the constitutional amendment now under consideration was framed with intent to prevent the further employment of such instrumentalities in spreading vexation, terror, and annoyance amongst the vanquished people of the South.

When military resistance and every other form of organized opposition to the government had ceased, the Congress, the States, and the people, properly turned their attention to the restoration of tranquillity, and no measure could have been adopted more conducive to that end than this third section of the new fourteenth article, provided it shall here receive the benign and politic construction for which we contend. It enacts in substance that no person shall hold any office, civil or military, under the Federal government, or under any State, who, having previously taken an official oath to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

The first proposition of my associate, Judge Ould, is that, whatever may be its effect, this constitutional provision executes itself, and requires for its complete enforcement no judicial action. This is too manifest for denial, and seems to be conceded. In the second place, he claimed that it inflicts a punishment. This is denied; and on me devolves no further duty than that of sustaining his argument in this respect against

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the objections made to it. No more need be done, for if that point can be sustained the indictments must be quashed.

And from all inquiry into merely technical interpretations, common sense could not fail to discern that disqualification to hold office is a punishment. The persons upon whom the sentence here operates are those who have already held official station, and been accustomed to the honor and distinctions which flow from the possession of political power. They are, and have long been the *elite* of their section. They have been revered as its guides and leaders throughout whatever of good or evil has marked its history in their day. In the defeat of their enterprise, the slaughter of friends in the field, the loss of fortune, and the ruin and desolation consequent upon these things, there are entailed upon them woes that might satiate any ordinary thirst for vengeance: all that, however, relates merely to the past. But in stamping upon such men the dishonorable brand of perpetual incapacity for public trust, is it possible to maintain that no punishment is inflicted? Most other penal inflictions touch only the person; this wounds the mind. It condemns the proud-spirited leader of his countrymen in peace and war, henceforth to walk his native soil in a rank far below the humblest of his former servants—a moral leper stigmatized in the constitutional law as unworthy of any trust, however trifling. In case of a foreign invasion he is indeed allowed to bare his bosom on the field in his country's defense, but this must be done, if at all, in the ranks as a private. Though among the bravest of the brave, and endowed with great ability to lead or otherwise execute the duties of a soldier, he may not be able to serve in the ranks, for physical strength is not always an accompaniment of intellectual excellence. In such a case the glorious privilege of contending for his country, and surrendering life, if

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needful, in her behalf, is virtually denied him. And this for what reason? Why, because he is a proclaimed traitor and *quasi* perjurer. It is because untried and unheard he has been condemned as utterly unworthy of trust or confidence. Seclusion from the paths of duty, honor, and renown, by an irreversible conviction for asserted perjury is surely an infliction, and as against the class in question is the severest that human ingenuity could have devised. It was not only of the severest nature, but according to the conception entertained of the offenders by those who devised it, the most poignantly afflictive. It touched precisely the offending part. Their crime was deemed the offspring of a lawless ambition, and by this disfranchisement, self-respect was incurably wounded—any future indulgence of ambitious aims was rendered impossible.

This view of the subject has been treated almost scornfully. Suggesting, with truth, that the erring multitude who never held office are not, according to our views, within the scope of this amendment, the learned counsel for the government pronounces the construction unreasonable. The leaders have, as he expresses it, added perjury to treason, and he accounts it unjust to visit them with no other penalty than a disqualification to hold office, leaving subject to indictment and the halter that less culpable class who were misled by their arts and contrivances. A practical discrimination of this kind might indeed seem objectionable; but the idea is altogether fanciful. Amongst civilized nations it has never been thought admissible or possible to prosecute the multitude. The undistinguished individual members of a rebellious State have never been thus dealt with. No great civil war was ever followed by an attempt to inflict punishment upon the masses through proceedings in the civil tribunals. Even when such forms have been dispensed with, and summary military executions resorted to, none but the most bar-

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barous nations have ever gone so far as a decimation of the vanquished. There never was any danger or any possibility of such a course in respect to the people of the Southern States. Great as is the number interested in advising prosecutions, practice illustrates the truth of these remarks. Throughout the South nearly every man and woman, nay, almost every child capable of participation, gave aid or comfort in some form to the cause of their section during some part of the recent conflict, yet now, after the lapse of three years from its termination, not one single private individual of this great multitude has been prosecuted. The many have not been indicted, nor is there any disposition or intent to indict them. The counsel may, therefore, relinquish his fears in their behalf: they can dispense with his sympathy: they are safe in their numbers and their obscurity, so far, at least, as respects the danger of indictments for treason. Not a single prosecution of the kind has been instituted except against persons of the very classes named in this amendment. Of these not more than a dozen have been prosecuted; and the government, to its great credit, has never attempted to bring one of these to trial. No man who fought in the Confederate ranks, or otherwise served the insurrection in a private capacity, has been indicted. Thus, the actual practice in this instance is shown to be in conformity with the experience of other times and countries in dealing with rebellions. In this fact is found a full answer to that argument against us which, it must be confessed, might strike an unreflecting person as plausible. Indictments, trials, and formal execution on the scaffold for political action deemed criminal in the peremptory judgment of the victor, are honors reserved for the chiefs only; and, therefore, in substituting another punishment it was quite natural that the framers of this amendment should have taken no notice of the

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many. An immutable State policy provided amply for their protection. An assurance to them that peace was restored, was indeed advisable. As a measure of statesmanship, it was dictated by wisdom, by humanity, by patriotism, and no form of giving expression to that assurance could have been more discreet on the one side, and more satisfactory on the other, than an irreversible prohibition of all future prosecutions against the leaders. Such was the true intent and aim of this amendment. General amnesties are appropriate to the termination of a civil war. If the construction contended for imparts in practical effect that character to the clause, the court should not be the less willing to accept it. Benignity toward the vanquished has been practiced even by monarchical power; it is eminently worthy of a republic. For proof of this I refer to 12 *Charles 2d, Chapter II., Section 23.*

Judge Underwood—How long after the restoration was that?

Mr. O'Conor.—One year.

Chief Justice.—That was not a well executed amnesty, except by the execution of many whom it amnestied.

Mr. O'Conor proceeded:

In the reason of the thing, and according to the authorities cited by my associate, Judge Ould, disqualification to hold office is a punishment, but the Constitution itself affords positive proof that it is so considered. The entire constitution, including all its amendments, is to be regarded as one instrument, and each of its provisions is to be construed in harmony with all others contained in it. The first article provides in its third section that "judgment in cases of impeachment shall not extend further than removal from, and disqualification to hold office." It then superadds, that nevertheless "the party convicted

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shall be liable to indictment, trial, judgment, conviction, and punishment according to law.”

If disqualification to hold office was not regarded by the framers of the Constitution as a punishment, this additional provision would not have been necessary or proper ; and from its insertion an irresistible implication arises that within the true intent and meaning of the fundamental law, such a disqualification is a punishment inflicted upon the individual against whom it is denounced or adjudged. The punishment in the section just referred to, is there called a “disqualification ;” the penalty denounced in the amendment which we are considering, is called a “disability.” No jurist will deny that these two words as employed in those provisions are perfectly and strictly synonymous. The new Fourteenth Article is but a supplement to the Constitution, and it can not be supposed to employ similar language in a sense different from that which governed in framing the original instrument. If it was not intended to make the disability denounced in the amendment, and inflicted by it, a substitute for any criminal or other prosecution to which the persons thus punished might have been before liable, a declaration to that effect would certainly have been added, as in the clause concerning impeachments.

It is not necessary to deny that preventing the appointment or election to public office of persons deemed unworthy, was an object of this amendment. That motive might well co-exist with the design to punish. Both certainly governed in framing the first branch of the impeachment clause. The second branch proves it. Indeed the primary object of all criminal law is to protect society by remedies for existing or anticipated evils. The object is not to wreak vengeance on the individual. Still, if the remedy resorted to be in itself punitive, a second punishment can not be inflicted as of course. The express sanction of some paramount

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law is needed to authorize such a departure from general principles.

The counsel for the government, assuming the provision to be prospective, contends that our construction would make it hold out a standing invitation to every artful man having treasonable objects in view to obtain office if practicable, and take an oath to support the Constitution as a preliminary step in crime. It is asked whether one who had thus sworn to support the Constitution would thenceforth stand privileged to engage in rebellion against the government, without danger of any more serious penalty than disfranchisement, whilst the comparatively venial offender who had never been confided with a public trust, and had not forsworn himself, might be hanged for a similar offense? This argument loses all force, and the illustration becomes pointless, the moment it is perceived that the provision is retrospective only. Penalties and punishments denounced by positive law are *prima facie* prospective only : the ordinary legislator is rarely empowered to give them a retrospect. But the sovereign authority from which this provision emanated was under no other than moral restraints in that respect ; and it will be conceded that the disqualification is denounced for offenses previously committed. That intent can not be denied, and the words employed are adequate to express it. But they are wholly incompetent to include both past and future delinquents. To reach the latter other words would clearly have been necessary : we therefore respectfully insist that pre-existing offenses only are within the scope of this provision. But if it is to be deemed capable of embracing also future offenders, still its operation as to them would be very different. Both the statutory punishment and this constitutional disqualification being enacted previously to the offense, no principle would be violated by imposing both penalties. But so far as

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this clause affects precedent offenses, unless it be taken as substitutionary, it would violate natural justice. In that case it would, contrary to recognized principles, add after the offense a new penalty to those which existed at the time of its commission.

The counsel now representing the government are evidently themselves convinced that the motion must prevail if a disability to hold office denounced against alleged offenders for their acts shall be deemed by this court the infliction of a penalty or punishment. Clearly it is in fact, and was deemed a penalty; it is impossible to avoid that conclusion. No one can suppose that an additional punishment for previous offenses was intended, leaving the offenders subject to those previously existing. Indeed the government counsel do not contend for that position: they content themselves with persistently denying, contrary to the manifest fact, that the clause is at all punitive. We trust this point will be determined against them. It is required by principles of natural justice, which have been recognized from the earliest times. They are older indeed than any of our written laws.

At the close of the rebellion there were controlling reasons of policy in favor of adopting disfranchisement for participating in the rebellion as a substituted punishment in lieu of the pains and penalties denounced in the crimes acts. A state of things existed which rendered criminal prosecutions under these acts inexpedient if not absolutely impracticable, yet it was difficult to argue successfully against a prevailing and irrational outcry for experiments in that direction. Many disturbers urged them. These persons were not prepared to bear, much less to acquiesce in the reasons which justified a refusal to keep up a war of indictments against the Southern leaders.

Sound minds having influence in public affairs therefore devised this amendment as a method of extricating

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the administration from a perplexing dilemma. The construction for which we contend can alone give it this effect. Such was, undoubtedly, the intent of its framers ; and, if so expounded by the courts, its operation will be as benign as its conception was just, wise, and politic.

That insuperable difficulties lie in the way of maintaining indictments for treason against the chiefs of the late insurrection is obvious. That any difficulty, even the slightest, can be encountered in such prosecutions is, to be sure, utterly incomprehensible to a certain narrow-minded class. The latter view the transaction precisely as they would the riotous action of a few school-boys during part of a summer afternoon. This court will entertain a larger and truer conception of its nature and consequences.

When an insurrection has reached the dimensions of a territorial civil war, and has upheld its dominion over a territory and people for a considerable period, the authority of the lawful government is suspended in fact, and its municipal laws are suspended for the time, except so far as the rebels adopt and act upon them as their own. Consequently, belligerent rights arise. The lawful government is unable in fact to extend any protection to the peaceful inhabitants within the rebel lines ; and, as a matter of policy, it outlaws them all, the most innocent and loyal in common with the most guilty and disloyal. Women, children, idiots, lunatics, and all who from mental or physical imbecility are unable to leave the country, are denounced as enemies. Not only is protection withheld from them, but their property, wherever found, is seized upon as lawful prey and prize by the government forces. The Supreme Court decided that the rebellion in the Southern States reached such dimensions and acquired such permanency as to impress upon the confederate territory and all the people

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within it, these hostile and essentially foreign relations toward the government of the United States. This state of things having existed for several years, and over a widely extended territory containing millions of inhabitants, it would be manifestly inconvenient and oppressive if, at the close of the conflict, the municipal law of the rightful government could at once come into full operation in respect to all intermediate belligerent acts, and be administered precisely as if no such interregnum had existed. The rebellion in this expanded form, with all the attributes *de facto* which belong to an independent State, lasted four years ; it might have lasted forty years, or a hundred years. The same principles of law would apply in each of these cases ; and it would be a novelty in jurisprudence if courts were to disregard as utterly inconsequential such a long exercise of independent power. Such ideas can not be practically enforced. Let us imagine a century of successful resistance, and the Southern Confederacy at last stricken down by the power of the government. If the war wrought no change during its existence in the duties of the people and the rights of the government, the laws and tribunals of the United States would immediately resume their sway, all intermediate acts would be treated as if the country was, during the whole interval, in its normal condition. The great grandson of Jefferson Davis, born in a nation *de facto* maintaining open and acknowledged war with the United States, and whose ancestors for two or three generations had stood in that same relation to our government, might be at once tried and executed as a common rebel and traitor. The argument for the prosecution in that case would be as direct and simple as it is in the present. The United States having claimed sovereignty over the land of his birth at all times from the inception of hostilities, had at last maintained its claim by the *ultima ratio*. He was a citizen born ; his long and

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successful resistance would avail not. It would be deemed merely an aggravation of his imputed crime. The argument would be brief, and it might be thought unanswerable; the indictment could be put in due form; and if, as some short-sighted people suppose, such a thing is practicable in this case, conviction and execution might promptly follow in that case. But such a procedure would outrage the moral sense of all civilized nations, and cover the perpetrators with infamy; yet, if the municipal law of the rightful government be not, in some degree at least, displaced by the state of belligerency between it and the rebels, such an indictment, conviction, and slaughter would be juridically unexceptionable.

Even in respect to civil controversy, such a civil war must work important changes. It can not be regarded as in all respects a mere riot. It is familiar doctrine that every member of a co-operating party engaged in violently executing an unlawful enterprise, is responsible for all injuries done by his associates. If the existence of our civil war worked no change in the application of this rule, any loyal citizen or soldier who suffered wounds or other injury during the late struggle, no matter where or how, could maintain a civil action for damages against any one or all of the thousands who served in the Confederate army. The common judgment of all our people that no such action would lie, is proven by the fact that no such action was ever brought. Occasions for it have been numberless, and a taste for litigation is not rare. Common sense has dictated to common minds that an open recognized civil war does work a very important change in this respect. The reluctance of the government to prosecute their criminal cases is also strong evidence of similar views in high places. From these and other considerations that might be offered we assert as an undoubtedly sound proposition of law, that bel-

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ligerent acts upon the rebel side performed in the due and orderly prosecution of a recognized civil war are not proper subjects of criminal prosecution during the conflict or after its close.

This doctrine might not satisfy the demands of justice if there were no other method of punishing gross delinquency in maintaining a rebellion; but the methods are ample. The war which displaces the municipal law, furnishes its own remedies. The very defeat of the rebels carries with it a multitude of inflictions; and if by conducting the war in an inhuman, cruel, or improper manner, they actually merit severe punishment, it may be inflicted without a resort to the civil tribunals. In such a case the leaders may be executed after or without a summary trial by court martial; the privates may be decimated or quarter wholly refused to them. There is no law capable of being enforced which enjoins upon the victor in war an obligation to spare his vanquished adversary. In the absence of compassionate feelings on his own part, he is under no restraint, except his respect for the common sentiment of mankind, and his unwillingness to incur the just censure of future ages.

When the vanquished in any such case have conducted themselves in so criminal a way as to deserve extreme severity, it may be employed against them with entire impunity. When they have not thus offended it ought not to be employed. It will, therefore, be seen that there is no occasion for resorting to the civil magistrate at the close of a civil war. His powers by indictments and trials by jury are not necessary to the just punishment of wicked rebels for warring against the government. But one motive could induce a victorious general, at the close of the civil war, to deliver his conquered adversary to the civil magistrate as a traitor; and that is a cowardly reluctance to confront the judgment of mankind on his own act in condemning

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the prisoner to a military execution. To be employed in thus shielding from responsibility a cruel and revengeful spirit would be a mean office. It is greatly to be regretted if, under any circumstances, the judges of the law could be compelled to perform it. But in the very nature of things, and by the fundamental principles of jurisprudence, they are necessarily exempted from it. In cases of civil war the right to prosecute the multitude in the ordinary course of law never was desired by any government, and as against the leaders it is upon general principles impossible. Their acts are public, open, and notorious. They do not form a legitimate subject of proof or disproof in a court of justice. Known to the government in all its departments, they are also actually and officially known to the judges. A demurrer to the plea of not guilty would seem a very fitting step for the prosecutor. A plea which the pleader would not be permitted to prove by witnesses could hardly be allowed as a bar. So much for the evident impracticability of employing the courts in such proceedings. This is an obstacle arising out of the very nature of things. But the Sixth Amendment to the Constitution contains by implication, or at least by its necessary effect, a prohibition of such prosecutions. It is as follows: "In all criminal prosecutions the accused shall enjoy the right of a speedy trial by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law." An impartial jury in the present case is an impossibility. To obtain one in any similar case that may possibly hereafter arise, will be alike impossible. The trial is required to take place in the very seat and hot-bed of the rebellion, where the jurors themselves must have actual personal knowledge of the principal facts which, upon an indictment and plea, would be formally put in issue. However fit to serve as witnesses, or to

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stand in the dock as prisoners, the inhabitants of the rebel district can never be competent jurors. Submitting to a jury of the County of Henrico the question whether an open and public war against the United States was here maintained and waged, and whether Jefferson Davis was the leader of it, would be not only a mockery and a farce, but a plain violation of the constitutional requisite that the jury shall be impartial. It is quite apparent that such a jury never can by any human possibility be found in the identical State or district in which such a public territorial war as that under consideration shall have been prosecuted. Taking this into view, and seeing that the Constitution requires a speedy trial, and forbids it to be had elsewhere, there results by obvious necessity a practical prohibition of indictments for treason in such cases. What the Constitution renders practically impossible it in effect forbids to be done. There can be no reasonable doubt that such was the intent of the revolutionary fathers. We find in the history of the times an adequate stimulant and incentive. It was in 1745, whilst many of those who subsequently participated in the revolution and in forming the Constitution were yet in their early youth, and glowing with the passionate sentiments which are then most active, that precisely such cruelties as this Sixth Amendment forbids were perpetrated in the mother country. No doubt they excited a thrill of horror and indignation throughout the colonies. The so-called Scotch rebels supported the Stuart, whom, not without some show of reason, they sincerely believed to be their legitimate sovereign. An honest if misguided loyalty animated their devotion to his cause, but superior force prevailed, and they were conquered. After their defeat the leaders were subjected to civil prosecutions for treason. They were not tried by or among their own countrymen; conviction there might have been impossible. They were

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dragged from their mountain homes to the county of Surrey, and there tried before Special Commissioners and English juries, to whom impartiality could not have been imputed. They were generally convicted and executed with all the attendant horrors enumerated in the barbarous treason sentence. They were hanged, drawn, and quartered. Many of the cases are stated in Sir Michael Foster's *Treatise on Crown Law*. This work, first published in 1761, soon found its way across the Atlantic; and just about the time when "the troubles in America," as they were called, began to unsettle British authority here. The harsh treatment and cruel fate of these true-hearted people were thus fully described and made known to our people. One of the most thrilling of these scenes was the subject of Shenstone's touching ballad, "Jemmy Dawson." It can not be doubted that the feelings excited by these cruel prosecutions induced the adoption of this Sixth Amendment. It was intended that no such transactions should ever stain the judicial annals of our country. It is fairly supposable that the far-seeing men who guided popular action in those days intended to render utterly impracticable such governmental measures at the close of any civil war that might perchance occur as a set of indictments for treason. They intended to let civil war, if it should arise, apply its own remedies for whatever of wrong might be committed in its progress. To harass a vanquished district with indictments for political offenses was not in their eyes a judicious policy. Honorable combat in the field should never be followed by a sordid persecution of the vanquished brave in criminal courts through the vile agency of spies and informers.

It can not be said that civil wars were not contemplated as possible or probable. In the *Federalist*, Letter No. 28, Alexander Hamilton himself portrayed in vivid colors as a possible future event, armed re-

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sistance of the federal government by a State or several States acting in concert and acting very effectively. The possibility of such events as have recently transpired in the South was foreseen. The Sixth Amendment was framed expressly to prevent this precise mischief in case they should occur, and the Third Section of the Fourteenth Article was framed in the same spirit. We respectfully insist that the court should interpret it accordingly, and by dismissing these vexatious prosecutions, give an assurance to the whole country that in all its forms the late unhappy conflict is ended. All honest admirers of that universal suffrage which has been established through this great civil war, earnestly desire that it should be accompanied by an amnesty as nearly perfect as possible of all political offenses committed during the struggle. Good men of all parties must entertain similar wishes.

On Saturday morning, December 5th, the Chief Justice announced that the court had failed to agree upon a decision in regard to the motion made to quash the indictments against Mr. Jefferson Davis.

The counsel for the defendant then asked that the fact of the disagreement be certified to the Supreme Court of the United States.

The Court signified its acquiescence, and thereupon the following paper was entered upon the record :

“At this term of the court, begun and held at Richmond, in the said district, on the 23d day of November, 1868, and continued until this day, a motion was made on behalf on the defendant to quash or set aside the said indictment, and to dismiss the same and the prosecution thereof.

“And upon that motion it appeared that the said Jefferson Davis, having previously to the offenses charged in the said indictment taken an oath as a member of Congress to support the Constitution of the United States, the question arose whether, by the op-

Certificate of Division.

eration and effect of the third clause of the Fourteenth Amendment to the Constitution of the United States, the defendant is exempted from indictment or prosecution for treason in levying war and participating or engaging in the late rebellion. And upon that question the opinions of the judges were opposed. And thereupon the said point is upon the request of the said defendant, stated under the direction of the said judges, and certified under the seal of the said Circuit Court to the Supreme Court of the United States at its next session."

After this certificate had been filed the District Attorney (Beach) said the only thing now necessary to be disposed of, was the appointment of the day for the trial. As counsel were anxious for a full bench on the occasion, he suggested the naming of some day after the adjournment of the Supreme Court before the close of the present term of the court.

The Chief Justice.—The difficulty is in fixing a day when there will be a full bench, as it is impossible to tell how long the Supreme Court may remain in session.

Mr. O'Connor.—In order that counsel may be definite in their appointments, he was rather inclined to ask that the recognizance of Mr. Davis be renewed for the May Term.

The Chief Justice.—Well, the recognizance may be renewed at any time during the present term. It is quite probable, however, that the court will adjourn before Christmas. The recognizance must, of course, be renewed before that time.

Mr. O'Connor.—It will be renewed immediately, to-day or on Monday.

The Chief Justice.—Very well. The certificate of disagreement has been made, as requested by the defendant. It may be filed, and a copy forwarded immediately to Washington.

End of the Case.

Whereupon the court adjourned.

No further proceedings were had in the cause. The Proclamation of General Amnesty by the President of the United States at the end of December, 1868, effectually disposed of the criminal prosecution, and the certificate of disagreement rests among the records of the Supreme Court, undisturbed by a single motion for either a hearing or a dismissal. At a subsequent term of the Circuit Court, the indictments against Mr. Davis were, on motion of his counsel, dismissed.

The Chief Justice instructed the reporter to record him as having been of opinion on the disagreement, that the indictment should be quashed, and all further proceedings barred by the effect of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case.

DISTRICT OF MARYLAND.

April Term, 1865.

THE MARY WASHINGTON.

The duty of a common carrier by water is not fulfilled by simply transporting from port to port; he must land the goods, and give a reasonable opportunity to the consignee to ascertain their condition.

The general rule requires that a carrier shall notify the consignee of the arrival of the goods, that opportunity may be given for inspection and removal of them.

If exceptions are made by usage, circumstances, or special arrangement, they must be proved.

A custom by a carrier to deposit goods in his warehouse, where the consignee is expected to call, without giving him notice of their arrival, must be shown to have been known by the consignee, and assented to by him, in order to discharge the carrier from liability.

The fact that after receiving such notice the consignee refuses to take the goods, can not relieve the carrier from liability for injury sustained by them *before* that time.

A court of the United States has, in general, no jurisdiction of suits against warehousemen by citizens of the same state.

The admiralty jurisdiction conferred by the constitution upon the national courts embraces all contracts of a maritime character, to be performed upon navigable waters. And through the contract is to be performed wholly within ports of the same state, this does not exclude the jurisdiction of these courts.

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This was a libel in admiralty. The respondents, doing the business of common carriers, undertook to transport goods, for certain freight, from Baltimore to Hill's Landing, on the Patuxent river, and to deliver them to one Pumphrey. Pumphrey was not there to

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receive them, and the respondents stored them in a warehouse attached to their wharf, and used as their own, as was their custom, giving the consignee no notice, and while thus stored they were injured. The charge for this storage was considered as included in the freight ; or, at least, it was not the custom of the respondents to make any extra charge for it.

P. W. Crain & W. M. Addison, for complainants.

W. P. Whyte, for respondents.

CHASE, Ch. J.—Under the circumstances of this case, I think the contract of affreightment bound the carriers not only to carry the merchandise to the landing, but to deliver it to Pumphrey, or excuse non-delivery by proof of equivalent action or waiver. The duty of a carrier by water is not fulfilled by simple transportation from port to port. The goods must be delivered, or at least landed, and a reasonable opportunity given to the consignee of ascertaining their condition. In order that opportunity for inspection and for the removal of the goods may be given, the consignee must be notified of the arrival of the goods. This is the general rule. If the exceptions are made by usage, circumstances, or special arrangements, they must be shown by proof.

In the present case, the respondents allege that it was not their practice to give notice to the consignees, but instead of giving such notice, to deposit goods in their warehouse, where the consignees were expected to call for them, on learning from their correspondents, or otherwise, of their arrival. They insist that this arrangement was for the benefit of the owners of the goods, and was understood and agreed to by them.

The evidence does not sustain this claim. It shows clearly enough, the practice of the respondents ; but it

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does not show any understanding, on the part of the owners of the goods, that the respondents were to be relieved from their responsibility as carriers until actual delivery of them, or an equivalent deposit in their warehouse, with information conveyed to the owners in some way that their goods had arrived. The warehouse arrangement was rather for the convenience of carriers than of freighters or consignees. The storage with information of arrival, however obtained, may be regarded, properly enough, as a substitute for actual and direct notice ; and it may be admitted that opportunity for removal, after such information, would discharge the carriers from responsibility as such, in the same manner as actual notice and the like opportunity. But to hold that mere deposit in their own warehouse, under the circumstances of this case, terminated their special responsibility, would be a dangerous relaxation of the salutary rule on which the security of commerce so largely depends.

It is clear, from the proof, that the merchandise was damaged after the landing, and while in the custody of respondents, before Pumphrey had information of its arrival, or opportunity to take it away. It seems, however, that the merchandise was not ordered from the libellants by Pumphrey, and that he declined to receive it ; and it is alleged that the carriers, therefore, were not liable. And there was proof that no order for the merchandise was actually given, and that Pumphrey, on learning its condition, refused to have anything to do with it. But it is not easy to perceive the importance of this circumstance.

It is plain enough that the libellants acted in good faith upon an expectation founded on a conversation with Pumphrey, that he would like to have the merchandise sent to him, and that he would receive and pay for it, if of good quality and in good condition, and the proofs show that this expectation was warranted.

Whether warranted or not, the duty of the carriers was in no way affected.

Their obligation, both to shippers and consignees, was to convey and deliver (or at least to deliver) safely. It is true that after Pumphrey had information of arrival, and declined to receive the merchandise because of its bad condition, the respondents could not be held responsible as carriers, to the libellants, for the subsequent injuries in the warehouse, but their responsibility for prior injuries was not changed, and it is that responsibility only which is now in controversy.

In the present case, the question whether the respondents were liable as common carriers or as warehousemen is of little importance, except as a question of jurisdiction. The proof shows a degree of negligence which would make them liable in either character. But if their liability were as warehousemen only, they would not be responsible in this court.

A court of the Union has in general no jurisdiction of suits against warehousemen by citizens of the same state. Remedies for violation of these contracts must be sought by their co-citizens in state courts.

It is not questioned, however, that the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. This is a provision of the national constitution. Nor is it questioned that this whole jurisdiction is vested by law in the District Courts of the United States, and, on appeal, in the Circuit Courts.

This was expressly enacted by Congress in 1789. Nor is it questioned that a contract of affreightment, to be performed by traversing tide-water, or other navigable waters, is in general a maritime contract, or that a suit upon such a contract makes a case of admiralty jurisdiction. This is settled by repeated decisions. But it is insisted that the contract of affreightment in this case was to be performed wholly within the state

of Maryland, and that this case, therefore, having arisen from an alleged breach of it, is not within the admiralty jurisdiction. Upon this I remark, in the first place, that there is nothing in the nature or history of admiralty jurisdiction which excludes from its cognizance contracts to be performed within the county or state in which it is exercised. On the contrary, such contracts, if maritime in their character, were constantly held, before the organization of the Union, to be proper subjects for that jurisdiction.

Within a comparatively recent period, however, doubts have been expressed whether such contracts can be enforced by national courts sitting in admiralty. Such doubts were expressed in 1848, by Justice NELSON, speaking for a majority of the justices of the Supreme Court of the United States, in the case of *New Jersey Steam Navigation Company v. Merchants Bank*, 6 *How.* 392. They were founded on the assumption that "the exclusive jurisdiction in admiralty cases was conferred on the national government, as clearly connected with the grant of commercial power," and were cautiously stated as follows: It is a maritime court, instituted for the purpose of administering the laws of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limits of the commercial power, which would confine it in cases of contracts to those concerning the navigation and trade of the county upon the high seas and tide-waters with foreign countries, and among the several states.

"Contracts growing out of the purely internal commerce of the states, as well as commerce beyond tide-waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal Courts."

The principle thus intimated rather than asserted was applied, ten years later, in the case of *Allen v. Newbery*, 21 *How.* 244, to a contract of affreightment

be performed on Lake Michigan, between two ports in Wisconsin; but the decision against the jurisdiction over the contract was placed quite as much upon the act of Congress of Feb. 26, 1845,—which restricts admiralty jurisdiction on the lakes and interior navigable waters to contracts relating to vessels employed between ports in the different states,—as upon the more general restriction derived from the limitation of the commercial power.

It can not escape observation that this denial of jurisdiction of the national courts of affreightment contracts to be performed between ports of the same state, but on navigable waters, when, in cases of tort, the admiralty jurisdiction is undoubted, rests wholly upon the assumption that the restriction upon the commercial power operates as a constitutional limitation of the jurisdiction in admiralty over contracts.

Now, without more than a reference to the difficulty of assigning a reason for such a limitation of that jurisdiction in matters of contracts, which would not require a like limitation in matters of tort, and to the admitted doctrine that in matters of tort no such limitation exists, it is proper to observe that it has been more than once distinctly denied by the Supreme Court that any inference whatever in respect to the jurisdiction in admiralty can be drawn from the constitutional provision concerning commerce. Thus in the case of *The Genessee Chief*, 12 *How.* 452, the late Chief Justice, speaking for the court, and speaking with special reference to admiralty jurisdiction, said: “Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants.”

So, too, in the case of *The Propeller Commerce*, 1 *Black*, 578, in 1861, the Supreme Court, noticing an

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objection to its jurisdiction on the ground that it did not appear that the propeller was engaged in foreign commerce, or in commerce between the states, and speaking though Justice CLIFFORD, said : “ Admiralty jurisdiction was conferred upon the government of the United States by the constitution, and in cases of tort, is wholly unaffected by the considerations suggested in the proposition.”

This is the latest judgment of the Supreme Court : and unless it can be shown that jurisdiction in matters of contracts is not as “ wholly unaffected by the considerations ” referred to as jurisdiction in matters of tort, it seems to be my duty, being fully satisfied that this court has jurisdiction, under the constitution and the law, over the contract of the respondents, to award to the libellants that justice to which the proofs clearly entitled them, without turning them out of this and requiring them to resort to another court. I do not think this can be shown, and therefore affirm the decree of the District Court.

Address.

ADDRESS OF THE CHIEF JUSTICE

TO THE GENTLEMEN OF THE BAR OF NORTH CAROLINA,
AT THE JUNE TERM, 1867.

The session of the Circuit Court of the United States for the District of North Carolina, at June Term, 1867, was numerously attended by the gentlemen of the Bar from all parts of the state. The Chief Justice had declined to attend any court on the circuit since the cessation of hostilities, until such time as authentic and official information was furnished him by the acts of the political department of the government, that military rule had been superseded by legal process, and that civil law was once more supreme within the limits of the circuit assigned to him.

Under these circumstances his attendance at Raleigh was regarded with great interest over the county, and the Bar attendant on the court signified, by their respectful deportment, their sense of the gravity of the occasion. Two years had elapsed since the Confederate armies had surrendered on the parol of the General-in-Chief of the United States forces ; and the presence of the highest officer of the judicial power of that government was considered as significant of the restoration of law and civil rule.

Under these circumstances the Chief Justice attended the court, the Bar having waited on him in a body at his lodgings ; and on opening the session he made the following address :

Gentlemen of the Bar : Before proceeding to regu-

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lar business, I think it proper to address a few observations to you.

For more than four years the courts of the Union were excluded from North Carolina by rebellion. When active hostilities ceased, in 1865, the national military authorities took the place of all ordinary civil jurisdiction, or controlled its exercise. All courts, whether state or national, were subordinated to military supremacy; and acted, when they acted at all, under such limitations and in such cases as the commanding general, under the direction of the President, thought fit to prescribe. Their process might be disregarded, and their judgments and decrees set aside by military orders. Under these circumstances the Justices of the Supreme Court, allotted to the circuits which included the insurgent states, abstained from joining the District Judges in holding the Circuit Courts.

Their attendance was unnecessary, for the District Judges were fully authorized by law to hold the Circuit Courts without the Justices of the Supreme Court, and to exercise complete jurisdiction in the trial of all criminal and almost all civil causes. And their attendance was unnecessary for another reason. The military tribunals at that time, and under the existing circumstances, were competent to the exercise of all jurisdiction, criminal and civil, which belongs, under ordinary circumstances, to civil courts.

Being unnecessary, the Justices thought that their attendance would be improper and unbecoming. They regarded it as unfit in itself and as injurious, many ways, to the public interests, that the highest officers of the judicial department of the government should exercise their functions under the supervision and control of the executive department.

At length, however, the military control over the civil tribunals was withdrawn by the President. The writ of habeas corpus, which had been suspended, was

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restored, and military authority in civil matters was abrogated. This was effected, partially, by the Proclamation of April 2, and fully, by the Proclamation of August 20, 1866. These proclamations reinstated the full authority of the national courts in all matters within their jurisdiction ; and the Justices of the Supreme Court expected to join the District Judges in holding the Circuit Courts during the interval between the terms at Washington.

On the 23rd of July, 1866, however, an act of Congress reduced the number of the circuits, and changed materially the district of which the Southern Circuits were composed, without making or providing for an allotment of the members of the Supreme Court to the new circuits ; and without such allotment the Justices of that court have no Circuit Court jurisdiction. The effect of the act, therefore, was to suspend the authority of Justices to hold the Circuit Courts in the altered circuits.

This suspension was removed by the act of March 2, 1867, by which a new allotment was authorized. Under this act the Justices of the Supreme Court have been again assigned to circuit duties ; and the Chief Justice has been allotted to hold, with the District Judges, the National Courts in the circuit of which the District of North Carolina is made a part.

I am here, therefore, to join my brother, the District Judge, in holding the Circuit Court for this district. It is the first Circuit Court held in any district within the insurgent States, at which a Justice of the Supreme Court could be present, without disregard of superior duties at the seat of government or usurpation of jurisdiction.

The associate Justices allotted to the other Southern Circuits will join in holding the Courts at the regular terms prescribed by law, and thus the national civil jurisdiction will be fully restored throughout the

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Union. It is true that military authority is still exercised within these Southern Circuits; but not now, as formally, in consequence of the disappearance of local civil authority, and in supervision or control of all tribunals, whether State or National. It is now used under acts of Congress, and only to prevent illegal violence to persons and property, and to facilitate the restoration of every state to equal rights and benefits in the Union. This military authority does not extend in any respect to the Courts of the United States.

Let us hope that henceforth neither rebellion nor any other occasion for the assertion of any military authority over courts of justice, will hereafter suspend the due course of judicial administration by the national tribunals in any part of the republic.

Statement of the Case.

DISTRICT OF NORTH CAROLINA,

June Term, 1867.

SHORTRIDGE & Co. v. MACON.

Compulsory payment of a debt to a receiver under the Sequestration Acts of the Confederate Government is no defense to a suit brought upon such debt by the creditor.

The suspension of intercourse consequent upon the recent war, did not prevent interest from accruing between citizens adhering to the respective parties thereto.

War levied against the United States by citizens of the Republic, under the pretended authority of the new state government of North Carolina, or of the so-called Confederate Government, was treason against the United States.

It is the practice of modern governments when attacked by formidable rebellion, to exercise and concede belligerent rights. These are concessions made by the Legislative and Executive departments in the exercise of political discretion. They establish no rights except during the war.

Courts have no policy and can exercise no political powers. They can only declare the law.

Legal rights could neither be created nor defeated, by the action of the government of the Confederate States.

The State of North Carolina by the Acts of her Convention in May, 1861, by the previous acts of her governor, by the subsequent acts of all departments of the state government, and by the acts of the people at the elections in May, 1861, set aside her state government and Constitution, connected under the National Constitution with the government of the United States, and established a new constitution and government connected with another so-called central government, set up in hostility to the United States, and entered upon a course of active warfare against the national government.

By these acts the practical relations of North Carolina to the Union were suspended, but they did not for a moment effect a separation of North Carolina from the Union.

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Statement of the Case.

Assumpsit, in which the plaintiffs declared upon a note executed by the defendant in 1860.

The plaintiffs were citizens of Pennsylvania at the time the note was given, and continued to be such until the bringing of the suit; and during that time the defendant continued to be a citizen of North Carolina.

Among other pleas, the defendant relied upon the fact that during the existence of the late government of the Confederate States, and by virtue of certain acts of Congress under that government, this debt had been confiscated, and he was compelled by process to pay it into its public treasury. It was also insisted that the state of things consequent upon the recent war between the United States and the Confederate States, was such as to excuse the defendant from payment of interest accruing during that period.

Bragg, for the plaintiffs.

Rogers & Batchelor, for the defendant.

CHASE, Ch. J.—This is an action for the recovery of the amount of a promissory note, with interest. There is no question of the liability of the defendant to the demand of the plaintiffs, unless he is excused by coerced payment of the note sued upon, under an act of the self-styled Confederate Congress, passed August 30, 1861, entitled “An act for the sequestration of the estates of alien enemies,” and an amendatory act passed February 15, 1862.

It is admitted that the plaintiffs were citizens of Pennsylvania; that the defendant was a citizen of North Carolina; that the note sued upon was made by the defendant to the plaintiffs; and that the defendant

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was compelled, by proceedings instituted in the courts of the so-called Confederate States, to pay the amount due upon it to the receiver appointed under the sequestration acts.

Upon these facts it is insisted that the defendant is discharged from his liability to the plaintiffs. It is claimed that, while it existed, the Confederate government was a *de facto* government, that the citizens of the states which did not recognize its authority were aliens, and in time of war, alien enemies ; that, consequently, the acts of sequestration were valid acts ; and, therefore, that payment to a Confederate agent of debts due to such citizens, if compelled by proceedings under those acts, relieved the debtor from all obligation to the original creditors.

To maintain these propositions, the counsel for the defendant rely upon the decisions of the Supreme Court of the United States, to the effect that the late rebellion was a civil war, in the prosecution of which belligerent rights were exercised by the National government, and accorded to the armed forces of the rebel Confederacy ; and upon the decisions of the state courts, during and after the close of the American war for independence, which affirmed the validity of confiscations and sequestrations decreed against the property of non-resident British subjects and the inhabitants of colonies or states hostile to the United Colonies or United States.

But these decisions do not in our judgment sustain the propositions in support of which they are cited. There is no doubt that the State of North Carolina, by the acts of the Convention of May, 1861, by the previous acts of the governor of the state, by subsequent acts of all the departments of the state government, and by the acts of the people at the elections held after May, 1861, set aside her state government and constitution connected under the national constitution with the govern-

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ment of the United States, and established a new constitution and government connected with another so-called central government, set up in hostility to the United States, and entered upon a course of active warfare against the national government.

Nor is there any doubt that by these acts the practical relations of North Carolina to the Union were suspended, and very serious liabilities incurred by those who were engaged in them.

But these acts did not effect, even for a moment, the separation of North Carolina from the Union, any more than the acts of an individual who commits grave offenses against the state by resisting its officers and defying its authority, separate him from the state. Such acts may subject the offender even to outlawry, but can discharge him from no duty and can relieve him from no responsibility.

The National Constitution declares that "treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The word "only" was used to exclude from the criminal jurisprudence of the new Republic the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief as being always and in essence treasonable.

War, therefore, levied against the United States by citizens of the Republic, under the pretended authority of the new state government of North Carolina, or of the so-called Confederate government which assumed the title of the "Confederate States," was treason against the United States.

It has been supposed, and by some strenuously maintained, that the North Carolina ordinance of 1861, which purported to repeal the North Carolina ordinance of 1789, by which the Constitution of the United States was ratified, and to repeal also all subsequent acts by

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which the assent of North Carolina was given to amendments of the constitution,—did in fact repeal that ordinance and those acts, and thereby absolved the people of the state from all obligations as citizens of the United States, and made it impossible to commit treason by levying war against the national government.

No elaborate discussion of the theoretical question thus presented seems now to be necessary. The question as a practical one is at rest, and is not likely to be revived. It is enough to say here that, in our judgment, the answer which it has received from events is that which the soundest construction of the constitution warrants and requires.

Nor can we agree with some persons, distinguished by abilities and virtues, who insist that when rebellion attains the proportions and assumes the character of civil war, it is purged of its treasonable character, and can only be punished by the defeat of its armies, the disappointment of its hopes, and the calamities incident to unsuccessful war.

Courts have no policy and can exercise no political powers. They can only declare the law. On what sound principle, then, can we say judicially that the levying of war ceases to be treason when the war becomes formidable? that war, levied by ten men or ten hundred, is certainly treason, but is no longer such when levied by ten thousand or ten hundred thousand? that the armed attempts of a few, attended by no serious danger to the Union, and suppressed by slight exertions of the public force, come, unquestionably, within the constitutional definition, but attempts by a vast combination, controlling several states, putting great armies in the field, menacing with imminent peril the life of the republic, and demanding immense efforts and immense expenditures of treasure and blood for their defeat and suppression, swell beyond the bound-

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aries of the definition and become innocent in proportion to their enormity.

But it is said that this is the doctrine of the Supreme Court. We think otherwise. In modern times it is the usual practice of civilized governments attacked by organized and formidable rebellion, to exercise and to concede belligerent rights. Under such circumstances, instead of punishing rebels when made prisoners in war as criminals, they agree in cartels for exchange, and make other mutually beneficial arrangements; and, instead of insisting upon offensive terms and designations, in intercourse with the civil or military chiefs, treat them, as far as possible without surrender of essential principles, like foreign foes engaged in regular warfare.

But these are concessions made by the legislative and executive departments of government in the exercise of political discretion and in the interest of humanity, to mitigate vindictive passions inflamed by civil conflicts, and prevent the frightful evils of mutual reprisals and retaliations. They established no rights except during war. It is also true, that when war ceased, and the authority of the regular government is fully re-established, the penalties of violated law are seldom inflicted upon many. Wise governments never forget that the criminality of individuals is not always or often equal that of the acts committed by the organization with which they are connected. Many are carried into rebellion by sincere though mistaken convictions; or hurried along by excitements due to social and state sympathies, and even by the compulsion of a public opinion not their own. When the strife of arms is over, and such governments, therefore, exercising still their political discretion, address themselves mainly to the work of conciliation and restoration, and exert the prerogative of mercy, rather than that of justice, complete remission is usually extended to large

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classes by amnesty or other exercise of legislative or executive authority, and individuals not included in these classes, with some exceptions of the greatest offenders, are absolved by pardon either absolutely or upon conditions prescribed by the government.

These principles, common to all civilized nations, are those which regulated the action of the government of the United States during the war of the rebellion, and have regulated its actions since rebellion laid down its arms. In some respects the forbearance and liberality of the nation exceed all example. While hostilities were yet flagrant, one act of Congress practically abolished the death penalty for treason subsequently committed, and another provided a mode in which citizens of rebel states, maintaining a loyal adhesion to the Union, could recover after war the value of their captured or abandoned property.

The national government has steadily sought to facilitate restoration with adequate guaranties of union, order, and equal rights.

On no occasion, however, and by no act, have the United States ever renounced their constitutional jurisdiction over the whole territory or over all the citizens of the republic, or conceded to citizens in arms against their country the character of alien enemies, or admitted the existence of any government *de facto*, hostile to itself within the boundaries of the Union.

In the prize cases the Supreme Court simply assented the right of the United States to treat the insurgents as belligerents, and to claim from foreign nations the performance of neutral duties under the penalties known to international law. These decisions recognized, also, the fact of the exercise and concession of belligerent rights, and affirmed, as a necessary consequence, the proposition that during the war all the inhabitants of the country controlled by the rebellion, and all the inhabitants of the country loyal to the

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Union, were enemies reciprocally each of the other. But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it, that the insurgent states, by the act of rebellion, and by levying war against the nation, became foreign states, and their inhabitants alien enemies. This proposition being denied, it must result that in compelling debtors to pay to receivers, for the support of the rebellion, debts due to any citizen of the United States, the insurgent authorities committed an illegal violence, by which no obligation of debtors to creditors could be cancelled or in any respect affected.

Nor can the defense in this case derive more support from the decisions affirming the validity of confiscations during the war for American Independence. That war began, doubtless, like the recent civil war—in rebellion. Had it terminated unsuccessfully, and had English tribunals subsequently affirmed the validity of colonial confiscation and sequestration of British property and of debts due to British subjects, those decisions would be in point. No student of international law or of history needs to be informed how impossible it is that such decisions could have been. Had the recent rebellion proved successful, and had the validity of the confiscations and sequestrations actually enforced by the insurgent authorities, been afterwards questioned in Confederate courts, it is not improbable that the decision of the State courts made during and after the revolutionary war, might have been cited with approval.

But it hardly needs remark that those decisions were made under circumstances widely differing from those which now exist.

They were made by the courts of states which had succeeded in their attempt to sever their colonial connection with Great Britain, and sanctioned acts which depended for their validity wholly upon success;

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and can have no application to acts of a rebel self-styled government, seeking the severance of constitutional relations of states to the Union, but defeated in the attempt, and itself broken up and destroyed.

Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.

We hold, therefore, that compulsory payment under the sequestration acts to the rebel receiver of the debt due to the plaintiffs from the defendant, was no discharge.

It is claimed, however, that whatever may be the right of the plaintiffs to recover the principal debt from the defendant, they can not recover interest for the time during which war prevented all communication between the states in which they respectively resided.

We can not think so. Interest is the lawful fruit of principle. There are, indeed, some authorities to the point that interest which has accrued during war between independent nations can not be afterwards recovered, though the debt, with other interest, may be. But that rule, in our judgment, is applicable only to such wars. We perceive nothing in the act of July 13, 1861, which suspended for a time all pacific intercourse between the loyal and insurgent portions of the country, that requires or justifies the application of that rule to the case before us. Legal rights could neither be originated nor defeated by the action of the central authorities of the late rebellion.

The plaintiff must have judgment for the principal and interest of his debt, without deduction.

Statement of the Case.

DISTRICT OF MARYLAND.

THE SEA GULL.

The rule that personal actions die with the person is peculiar to common law, traceable to the feudal system and its forfeitures, and does not obtain in admiralty.

The process to enforce the remedy for a wrong done or injury incurred by the death of a person, may be either *in personam* or *in rem*.

A husband can recover by a proceeding *in rem*, against the vessel which caused the death of his wife, for the injury suffered by him thereby.

A plea to a libel which sets up no matter in defense, is substantially a demurrer.

When such a plea is overruled, it is in the discretion of the court to allow an answer to be filed, or to enter a decree at once for the damages claimed.

It not having been suggested on the hearing that the facts set forth in the libel were untruly stated, and from other circumstances the court refused to allow an answer to be filed, on its overruling the plea, and entered a decree for the damages.

Statement of the Case.

The steamers Sea Gull and Leary, plying out of the port of Baltimore in the trade of the Chesapeake, came in collision, whereby the Sea Gull injured the Leary, and caused the death of the wife of the libellant in this case, who was stewardess on the Leary. Whereupon the husband filed his libel in the District Court against the Sea Gull, charging that the collision was caused by the fault of that steamer, that it had caused the death of his wife, and claiming damages for the loss so done to him.

The respondents plead to the libel that there was no cause of action to the husband for the death of his

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wife, and that if there was, his remedy was in a court of common law, and not in a court of admiralty.

- On this plea the libel was dismissed, and the cause came to this court by appeal.

Wm. M. Addison and Richard R. Battel, for libellants.

Brown & Brune, for respondents.

CHASE, Ch. J.—The libel in this case seeks redress for injuries to the wife of the libellant, terminating in her death. It alleges that the wrongs complained of were occasioned by the collision of the steamer Sea Gull with the steamer Leary, and that the collision occurred through the fault of the Sea Gull.

The owners of the Sea Gull responded to the libel by a plea, that the matters alleged were not within the cognizance of the court; that the libellant had no right to sue for the alleged wrong, and the court had no jurisdiction in the premises; and that if it had jurisdiction, the proceedings should be *in personam*, and not *in rem*.

Upon the hearing, the libel was dismissed by the District Court, and the case comes here by appeal.

The last question presented by the plea *will be considered first*.

It is not easy to see upon what principle *wrongs to persons*, can be distinguished in respect to relief in admiralty, from *injuries to things*. Both cause damages to parties, to be compensated in money; and both are occasioned by similar wrongful acts. There is, in the second volume of Wynne's "Life of Sir Leoline Jenkins," a collection of his official letters on admiralty questions, submitted to him from time to time by the Lords Commissioners and the other functionaries of the government, in one of which—at page 774—he says,

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that "the freighters, owners, and masters of certain English vessels have a good action of *spoil* and *damages* against a Dutch caper (privateer) that detained and robbed them, and might maintain the action in the court of admiralty by process against the offending ship and her commander, for damages occasioned by the loss of goods and of time, and by the violence they had suffered."

This is, perhaps, the earliest instance in which *the right of action in admiralty* against a ship or master, for personal injuries to individuals on another ship, was asserted. It might be going too far if we were to give much weight to so ancient an authority, even of so great a judge, if there were anything in the doctrine contrary to sound reason. But the same point has been lately determined by a decision of a very enlightened and able judge (Judge SPRAGUE, of the District Court for Massachusetts).

In the case of the *Maverick*, it was held by him that a steamer colliding with a vessel, and in fault, was liable for the personal injuries occasioned by the collision to the libellant, who was mate upon the other vessel. This case is in point upon the question of remedy, and I accept this authority as sufficient for the case before us upon that question.

The *objection to jurisdiction*, made by the plea, rests upon the propositions that a husband can not recover for injuries to his wife, after her death. It was urged in support this objection that *personal actions die with the person*. But this maxim does not seem to apply to the case before us. The suit is not prosecuted by an administrator, but by the husband of the deceased, and redress is sought for damages to him through injuries to her.

There are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the

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death of one through the wrong of another ; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures.

The case of *Baker v. Boardman* (1 *Campbell*, 493) is the leading English decision, followed in Massachusetts by the case of *Carey v. The Berkshire R. R. Co.* (1 *Cushing*, 475). The English Parliament has corrected the English law, and supplied a remedy. The Massachusetts legislature has done the same thing for the Massachusetts law. In other states, the English precedent has not been followed. In *Ford v. Monroe* (20 *Wendell*, 210), a father recovered damages for the death of his son, killed by the negligence of the defendant's servants ; and in *James v. Christy* (18 *Missouri*, 162), an action was maintained against the owner of a boat, brought by a father to recover damages for the death of his son, occasioned by a defect in the machinery. These latter authorities were approved of by Judge SPRAGUE, in the case of *Cutting v. Seabury*. He observes that "the weight of authority in common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it." He adds : "It is not controverted that if a father be willfully and wrongfully deprived of the services, society, and control of his minor son, he may maintain an action against the wrong-doer if the son survive. Why, then, if the same wrong be done and aggravated by the death of the child, should his right of action be lost ?" It is difficult to answer this question, and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.

These considerations require that the plea be overruled.

It sets up no matter in defense. It is, in substance,

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a demurrer to the libel. It avoids, indeed, by protestation, the confession of the truth of the allegations, but this is common to all demurrers.

The question whether the respondent shall be permitted to answer the allegations of the libel is, therefore, one of discretion with the court. And this question would be resolved by permitting the answer to be filed, if the fact that the Sea Gull was in fault in the collision had not been fully considered and determined in another case, or if there were any reason to suppose that the facts stated in the libel in relation to the injuries caused to the libellant were untruly stated.

When the cause was heard, however, there was no suggestion of this sort. Upon the whole, therefore, I shall overrule the plea, and render a decree taking the facts stated in the libel as true, without allowing an answer to be filed.

A decree will be entered in favor of the libellant for twenty-one hundred dollars.

Decree entered accordingly.

Statement of the Case.

DISTRICT OF MARYLAND.

THE HIGHLAND LIGHT.

The admiralty may be styled the humane providence which watches over the rights and interests of those "Who go down to the sea in ships, and do their business on the great waters."

Its jurisdiction for marine torts, may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the person injured.

The widow and son of a hand killed on a steamboat by the negligence of the engineer, have suffered an injury for which they have a remedy against the owners of the vessel.

The Act of Congress makes the fact of the injurious escape of steam full *prima facie* proof of negligence to charge the defendant in all actions against proprietors of steamboats, for injuries occasioned by injurious escape of steam.

This case distinguished from that of the Sea Gull.

There the injury was *by the vessel herself* to the wife of the libellant, who was an employee on another vessel.

The remedy there held to have been either *in rem* or *in personam*.

In this case the injury is to an employee of the owners on their own ship, the injury being caused by the negligence of a co-employee.

This court would hesitate to apply to this case the common-law rule that one employee can not hold his employer responsible for injuries caused by the fault of his co-employee.

The statute law of Maryland, however, furnishes a clear right and a plain remedy, and the right may be enforced in this court by admiralty processes.

It is not necessary to pursue a statutory remedy in order to enforce a statutory right.

The Acts of Congress confine the remedy *in rem* for injuries from injurious escape of steam to actions brought by passengers—and the remedy *in personam* against owners for such injuries done to others on board.

It is obvious that Congress intended by these laws, to provide for all cases of redress for injuries from these causes, and no action for such injuries can be maintained unless sanctioned by its legislation.

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No remedy in this case can be had in this court, except by an action *in personam* against the owners, and this libel was, therefore, properly dismissed by the court below.

Statement of the Case.

Price was employed as a hand on the steamer Highland Light, a vessel sailing out of and registered in the port of Baltimore. While navigating waters within the jurisdiction of Maryland, her steam-chimney collapsed and caused the death of Price. Whereupon his widow and son filed their joint libel against the steamer *in rem*. There was some proof that the owners had exercised due diligence in supervising the steam machinery of the vessel when it was originally put in, but it was clear that the steam-chimney had been remarkably insufficient at the time of the accident.

Robt. J. Brent and Wm. M. Addison, for libellants.

Wallis & Thomas, for respondents.

CHASE, Ch. J.—This is a libel for damages occasioned by steam escaping from a collapsed steam-chimney of the steamer Highland Light, and causing the death of William Price, the husband of one, and father of the other libellant.

The first question is as to jurisdiction.

In *Hiner v. The Sea Gull* (*ante*), we held that the admiralty jurisdiction extends to the redress of injuries to persons on one vessel caused by the negligence of those charged with the navigation of another. And it is abundantly settled (*steamer New World*, 16 *How.* 472) that it extends to suits against vessels and owners and masters for injuries to persons on board as passengers, whether carried for hire or gratuitously.

Indeed, the jurisdiction for marine torts in admir-

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alty may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the persons injured (*Chamberlain v. Chandler*, 3 *Mason*, 342).

The admiralty may be styled, not improperly, the human providence which watches over the rights and interests of those "who go down to the sea in ships, and do their business on the great waters." I entertain no doubt, therefore, upon the general question of jurisdiction. Whether a case is made for its exercise is a different inquiry.

And the question now to be considered is whether, in the case before us, damages can be awarded to the libellants, in this form of action *in rem*, for the injury occasioned to them by the death of their relative.

This question resolves itself into three other questions: 1. Was the injury caused by negligence? 2. Can the libellants have redress in admiralty for the particular injury alleged in the libel? 3. Can they have such redress in the form of action they have adopted?

And to these questions I will now endeavor to give an answer.

1. Was the injury caused by negligence?

It was caused by the explosion of the steam-chimney.

The act of July 7, 1838, in its 13th section, provides that "in all suits or actions against proprietors of steamboats, for injuries arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue or other injurious escape of steam, the fact of such bursting, collapse, or other injurious escape of steam, shall be taken as full *prima facie* evidence, sufficient to charge the defendant or those in his employment with negligence, until he can show that no negligence has been committed by him or those in his employment" (5 *Stat.* 305).

In this case, the fact of an injurious escape of steam

is undisputed. The full *prima facie* proof of negligence is therefore made. Is the negligence, then, disproved? Have the respondents shown that no negligence has been committed by them or those in their employment?

It is unnecessary here to inquire into degrees of negligence. In the use for navigation of such a powerful and dangerous agent as steam, it was expressly declared by the Supreme Court, in *The Philadelphia Railroad Company v. Derby* (14 *How.* 486), and repeated in the case of *The New World* already referred to, that "any negligence may well deserve the epithet of gross." To repel the inference of negligence in this case, then, there must be such clear proof of care and vigilance as will exclude any reasonable belief that there was any negligence whatever on the part of the owners, or any of their employees, which contributed to the explosion.

And I think that the evidence fairly matches this requirement in respect to the original sufficiency of the boilers and other steam apparatus of *The Highland Light*. But the evidence of the insufficiency, and the remarkable insufficiency of the steam chimney, at the time of the explosion, is equally clear; and it is by no means certain that a somewhat greater degree of care and vigilance on the part of the owners or their engineers, would not have prevented the catastrophe. Indeed, under all the circumstances detailed in the evidence, I am rather led to the conclusion that there was negligence for which the owners are responsible than that there was not. At any rate, under the statutes, in the absence of convincing evidence to the contrary, negligence in this case must be considered as proved.

2. Can the libellants have redress in admiralty for the particular injury alleged in the libel?

The libellants are the widow and son of the man whose injuries occasioned by the negligence thus

proved, resulted in death. Their right to compensation is a natural right. And I perceive no more ground for denying redress in admiralty in this case, than in *Hiner v. The Sea Gull*, unless it be found in the circumstance, that the man killed was a hand on the boat, and the negligence which caused the injury was that of the engineer, and not that of the owners. It was insisted in argument that this circumstance does distinguish the cases, and that an employee can not have redress against his employer for injuries caused by the negligence of a co-employee. And this is the general rule of the common law (*Priestly v. Fowler*, 3 *Mess. & Wels.* 1), though it is undoubtedly limited in its application by another rule, that "where a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman" (*Patterson's wife and children v. Wallace*, 1 *McQueen*, 751).

I should hesitate to hold, even in the absence of statutory provisions, that the first rule ought to be applied in the case now under consideration. In several of the cases cited for the respondents, exceptions or qualifications are made which may fairly be held to take this case out of its application (*Farwell v. Boston & Wor. R. R. Co.* 4 *Met.* 49; *O'Connell v. B. & O. R. R. Co.* 20 *Md.* 220).

But the positive law of statutes seems to me to furnish a sufficient rule for guidance in the case of relatives seeking redress for the death of a relative, whether the injury be caused by strangers, or persons who are, in some sense, co-employees.

The act of parliament, commonly known as Lord Campbell's act, introduced the first great change in the common-law rule that personal actions die with the person, by making wrong-doers responsible in damages for injuries resulting in death (9 and 10 *Vict.* c. 93, sec. 1, A. D., 1846). This act recognizes the equitable

right to redress for such injuries in its title, "An act for compensating the families of persons killed by accidents." Many of the United States have enacted similar statutes, and among these States Maryland has followed quite closely the act of parliament. The law of Maryland (1 *Md. Code*, 449) like the act of parliament, establishes in one section the general right to redress, and in another provides the mode in which redress may be pursued.

The right is quite separate from the remedy. The rights, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in admiralty by its own processes. It is not necessary to pursue the statutory remedy in order to enforce the statutory rights.

It is clear, therefore, that for an injury such as that proved in this case, the wife and son of the man killed may have redress in admiralty. And the act of 1838, in the section already quoted, seems to contemplate no distinction between actions for injuries to hands employed on board, and to injuries to other persons on board. It appears to regard the negligence of the person employed as the negligence of the owners, and infers the existence of it from the unheeded or too little heeded defects of the steam apparatus.

I incline, therefore, to the opinion that the libellants in this case are entitled to redress against the owners, though the engineer may have been immediately responsible by his own negligence for the injury. It is not necessary, however, in this case, to decide this particular point.

3. The remaining question is, "Are the libellants entitled to redress in the form of action which they have adopted?"

The statute of 1838 recognized, and provided a rule of evidence for actions against owners. It would seem that this statute must have been amended while under legislative consideration. The sixth section made owners

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and masters responsible for injuries to property of passengers by explosion of boilers, and derangement of engine or machinery, caused by failure to employ competent engineers. But this section seems to have been superseded by the broader provisions of the thirteenth, which, as has been already said, sanctioned actions for all injuries occasioned by bursting of boilers, collapse of flues, or other injurious escape of steam. But no action is sanctioned by this section except against owners, and by the 30th section of the act of 1852 (10 *Stat.* 69), the action *in rem* is limited to passengers. It is a fair, if not an inevitable inference, that it was the intention of Congress to confine the remedy *in rem* to passengers, and to allow to others on board injured by the causes enumerated only the remedy *in personam*. And it is obvious that Congress intended to provide for all cases of redress for injuries from these causes, and that no action for such injuries can be maintained unless sanctioned by its legislation.

While, therefore, I am unable to adopt the views of the counsel for the respondents, that parties in the predicament of the libellants have no remedy unless against the engineer of the steamer, I am constrained on the other hand to the conclusion, that no other remedy can be had except an action *in personam* against the owners. The decree of the District Court, dismissing the libel against the steamer, must be affirmed.

I venture to add, in the language of Lord Brougham, in *Patterson v. Wallace*, a case in some of its features very similar to this, that "I can not but hope that the defendants will see the propriety of putting an end to the case, by making some voluntary and benevolent compensation to the unfortunate appellants."

Statement of the Case.

DISTRICT OF MARYLAND.

October Term, 1867.

EX PARTE TURNER.

Colored persons equally with white persons are citizens of the United States.

The "civil rights bill" is constitutional, and applies to all conditions prohibited by it, whether originating before or since its enactment. A colored person held under an indenture of apprenticeship made under a statute of Maryland, which provides for such persons being apprenticed on terms much less favorable to them than those provided for white persons, discharged.

Habeas corpus.

Statement of the Case.

Slavery had existed by the common law of Maryland since its first settlement, and under its later state constitutions, the General Assembly had been prohibited from passing laws interfering with it. So the laws and institutions of that state continued until 1864, when a convention was held to frame a new constitution, which was done. A clause in the new instrument abolished slavery in Maryland, and prohibited its future existence or introduction. This constitution was submitted to the people for ratification by popular vote, which being had, it appeared that a majority of the votes cast at the regular voting places was against the adoption of it, but by counting certain votes returned as cast in their camps, some of which were not in Maryland, by certain Maryland troops then engaged in the armies of the United States in the civil

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war, a majority of votes appeared to have been in favor of the ratification of it.

The constitution was thereupon declared by proclamation of the then governor to have been adopted, and was put in operation.

The legislation of Maryland in regard to apprenticeship of white persons and free negroes, had always preserved the broad line of demarkation between the white ruling race, and the black subject one, and by the laws of Maryland the free negro, while having no political rights, was entitled to civil or legal rights to a large decree, but not equally with the whites. Under these circumstances, the petitioner had been apprenticed, immediately after the enfranchisement of the slaves, in the manner specified above, to Philemon T. Hambleton, of Talbot county, Maryland, a gentleman of substance who had been the owner of her, her mother and other slaves. The respondent appeared in person, and submitted the case without resistance to the motion for discharge.

The Chief Justice said that in view of the importance of the questions involved, it would be agreeable for the court to hear them discussed on the part of the respondent, Mr. Hambleton, and, therefore, adjourned the court until next day, to give anyone interested an opportunity to be heard.

At that time no counsel appearing for respondent, who had expressed his intention not to be thus represented, and no member of the Bar indicating a desire to be heard as *amicus curiæ*, the court proceeded to deliver its opinion.

Stockbridge, for petitioner.

CHASE, Ch. J.—The petitioner in this case seeks relief from restraint and detention by Philemon T. Hambleton, of Talbot county, in Maryland, in alleged contravention of the constitution and laws of the United States.

The facts as they appear from the return made by Mr. Hambleton to the writ, and by his verbal statement made in court, and admitted as part of the return, are substantially as follows :

The petitioner, Elizabeth Turner, a young person of color, and her mother, were, prior to the adoption of the Maryland constitution of 1864, slaves of the respondent.

That constitution went into operation on November 1, 1864, and prohibited slavery.

Almost immediately thereafter, many of the freed people of Talbot county were collected together under some local authority, the nature of which does not clearly appear, and the younger persons were bound as apprentices, usually, if not always, to their late masters. Among others, Elizabeth, the petitioner, was indentured to Hambleton, by an indenture dated November 3, two days after the new constitution went into operation.

Upon comparing the terms of this indenture (which is claimed to have been executed under the laws of Maryland relating to negro apprentices), with those required by the law of Maryland in the indentures for the apprenticeship of white persons, the variance is manifest. The petitioner under this indenture is not entitled to any education ; a white apprentice must be taught reading, writing, and arithmetic. The petitioner is liable to be assigned and transferred at the will of the master to any person in the same county ; the white apprentice is not so liable. The authority of the master over the petitioner is described in the law as a "property and interest ;" no such description is applied to authority over a white apprentice. It is unnecessary to mention other particulars.

Such is the case. I regret that I have been obliged to consider it without the benefit of any argument in support of the claim of the respondent to the writ.

But I have considered it with care, and an earnest desire to reach right conclusions.

For the present, I shall restrict myself to a brief statement of these conclusions, without going into the grounds of them. The time does not allow more.

The following propositions, then, seem to me to be sound law, and they decide the case :

1. The first clause of the Thirteenth Amendment to the Constitution of the United States interdicts slavery and involuntary servitude, except as a punishment for crimes, and establishes freedom as the constitutional right of all persons in the United States.

2. The alleged apprenticeship in the present case is involuntary servitude, within the meaning of the words in the amendment.

3. If this were otherwise, the indenture set forth in the return does not contain important provisions for the security and benefit of the apprentice, which are required by the laws of Maryland in indentures of white apprentices, and is, therefore, in contravention of that clause of the first section of the civil rights law enacted by Congress on April 9, 1866, which assures to all citizens, without regard to race or color, "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

4. This law having been enacted under the second clause of the Thirteenth Amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it, whether originating in transactions before or since its enactment.

5. Colored persons as well equally with white persons are citizens of the United States.

The petitioner must therefore be discharged.

The following order was entered: *Ordered by the court*, this 16th day of October, A. D. 1867, that Eliza-

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beth Turner, be discharged from the custody of Philemon T. Hambleton, upon the ground that the detention and restraint complained of is in violation of the constitution and laws of the United States ; and it is further ordered that the costs of this proceeding be paid by the respondent.

Opinion by CHASE, Ch. J.

DISTRICT OF MARYLAND.

April Term, 1868.

THE LULU.

The home port of a vessel is where she is owned and enrolled.

Such home port being in one state, material-men furnishing her with supplies at a port in another state, between which latter and a third port she was regularly engaged in carrying, may acquire a lien upon her.

In such case, it seems that if the vessel had been regularly chartered to persons residing at the second port, her home port might have been thereby changed.

In order for material-men to make out a case for a lien upon a vessel for supplies furnished, it is incumbent on them to show that there was a necessity existing for the supplies, and that it was necessary to obtain them on the credit of the vessel—that they were furnished to meet this necessity, and with a view by them of looking to the vessel for their security.

It is only in case of necessity for credit that a master can hypothecate his vessel by bottomry bond or express obligation, or create a lien by obtaining repairs and supplies on her credit.

The proof of the necessity for the credit, is as essential as the proof of the necessity for the supplies.

The lien for repairs and supplies is superior to that created by bill of sale or mortgage, whether prior or posterior in time.

The statement of the case will be found in the opinion of the court.

CHASE, Ch. J.—This is a suit in admiralty to enforce a lien claimed upon the steamer Lulu, for repairs made upon her by the libellants at the request of the master.

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It is consolidated with other suits, all brought by material-men for supplies or repairs to the vessel.

The Lulu was a steamer owned in New York, which was her home port, but employed in the trade between Baltimore, in Maryland, and Charleston, in South Carolina. When the libel was filed, she had been in the trade about eleven months—from April, 1866, to March, 1867.

The repairs and supplies for which satisfaction is sought, were furnished in Baltimore, during and after July, 1866, but chiefly in November and afterwards. They were furnished at fair prices, and were proper and necessary.

In each suit the New York Guaranty and Indemnity Company has filed a claim and answer, asserting a prior right to satisfaction out of the proceeds of the steamer ; which has been sold under an order of the court.

The claim of this respondent is founded upon a bill of sale made to the company on August 24, 1866, by the former owners of the Lulu, in consideration of twelve thousand dollars. The bill of sale, though in form absolute, was intended as a mortgage to secure repayment of the advance, in six months from the date ; but no part of it has been repaid.

The only question in this cause is, whether the material-men, under the circumstances of the case, had a lien for their repairs and supplies ; for if they had, this lien is superior to that created by the bill of sale or mortgage, whether prior or posterior in time.

It was insisted on the argument, that Baltimore was the real home port of the Lulu, and that there could be no lien for repairs and supplies furnished in the home port ; and this might be a material circumstance in the decision of the case, if it appeared that the Lulu was chartered to citizens of Baltimore for the Charleston trade. Such a charter might be considered as transfer-

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ring her home port from New York to Baltimore ; especially when taken in connection with the proved facts of the case, which show that Baltimore might very fairly be called the actual home of the Lulu, during the time of the transactions in controversy. But there is no evidence of such a charter ; and it is clear that under the American decisions, Baltimore being in another state than that in which the vessel was owned and enrolled, must be regarded as a foreign port ; and that in a proper case, material-men would be entitled to a lien for supplies there furnished.

The question then occurs, " Were the repairs and supplies in question furnished under such circumstances as would entitle the material-men to the liens which they claim ? "

The general rule applicable to this class of cases was first laid down in *The General Smith* (4 *Wheat.* 443), as follows: " When repairs have been made or necessities have been furnished to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit *in rem* in the admiralty to enforce his right." The same rule, in substance, was affirmed in *Pegroux v. Howard* (7 *Pet.* 324), in *The Nestor* (1 *Sumn.* 73), and in several other cases. The nature and degree of necessity essential to the creation of a lien for repairs and supplies was much considered in the case of *The Laura*, or *Thomas v. Osborne* (19 *How.* 28, 35). The court then said, in substance, that it is only in case of necessity that the master can hypothecate the vessel by bottomry bond or other express obligation, or create a lien by obtaining repairs and supplies on her credit (p. 30), and that, to constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit to procure them (p. 31). If the

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master has funds which he ought to apply in payment, but does not, and the furnisher knows this fact, or has the means by due diligence to ascertain it, then no case of actual necessity to have a credit exists, and no maritime lien is created by furnishing repairs and supplies. The rule on this point was stated Ch. J. TANEY, who, with Justices McLEAN and WAYNE dissented from the judgment of the majority, somewhat less stringently, as follows: "That repairs and supplies in a foreign port, if necessary to enable a vessel to proceed, are presumed to have been furnished and made on the credit of the vessel, unless the contrary appears, as well as on that of the master and owners; and creates a lien which may be enforced in admiralty" (p. 38). The difference between the court and the dissenting justices on this point was that the former held that, in order to the creation of the lien, there must be a necessity for the credit as well as a necessity for the supplies, while the latter seem to have thought that if the supplies were necessary, the credit may be presumed.

The same subject was further considered at the same time in the case of *The Sultana, or Pratt v. Reed* (19 *How.* 359). That case was in its general features much like the case under consideration. It was a libel against the steamer *Sultana* for supplies of coal furnished from time to time, from June, 1852, to May, 1854, and the lien for supplies was contested by the answer, which set up a claim under a prior mortgage on the steamer, dated October 31, 1863. The court held that the material-men had no lien, and decreed the proceeds to the mortgagees. The court stated the rule thus: The proof of a necessity at the time of procuring a supply for a credit on the vessel "is as essential as that of the necessity of the article itself." It is only under very special circumstances and in an unforeseen and unexpected emer-

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gency that an implied maritime hypothecation can be created.

The decision of the case was not put upon the ground that the supplies were unnecessary, but upon the ground that there was no sufficient proof of a necessity for the implied hypothecation of the vessel, or of any unexpected or unforeseen exigency that required it.

A distinction between the cases now to be adjudged and the cases thus decided was attempted in the argument; but I find myself unable to make any which has substance. That decision was by a unanimous court, and was on the very point which must govern these cases, namely, the necessity of the credit; and I am unable to discover any very special circumstances, any very unexpected and unforeseen emergency in these cases which will take them out of the application of the rule which the decision cited establishes. The repairs and supplies in all the cases now presented, were furnished in the ordinary course of trade, and under ordinary circumstances.

There is no proof whatever of any unusual exigency. Except in the case of *Coleman v. Bailey*, there is no averment of the necessity of a credit to the steamer.

It was contended also that the rule goes beyond any that has heretofore been applied to material-men by the courts; and I must admit that I have found no other case in which proof so stringent as that required by it has been held essential to a lien for repairs and supplies. But the rule established by the unanimous judgment of the Supreme Court is not on that account less binding upon me.

I am constrained, therefore, to hold that the furnishing of the repairs and supplies set forth in the several libels, did not create a maritime lien in favor of the libellants; and that the respondents are entitled to the proceeds in the registry, after payment of costs.

Statement of the Case.

DISTRICT OF VIRGINIA.

May Term, 1868.

KEPPEL'S ADMRS. v. PETERSBURG R. R. Co.

The term *de facto* as descriptive of a government, has no fixed and definite sense. It is perhaps most correctly used as signifying a government completely, though only temporarily, established in place of the lawful or regular government, occupying its capital and exercising its power.

The term, however, is often used, and perhaps more frequently, in a sense less precise, as signifying any organized government established for the time over a considerable territory, in exclusion of the regular government. A *de facto* government of this sort is not distinguishable in principle from other unlawful combinations. It is distinguishable in fact mainly by power, and in territorial control, and by the policy usually adopted in relation to it by the National Government.

It can not be maintained that levying war against the United States by persons, however combined and confederated (even though successful in establishing their actual authority in several states), would not be treason.

In the more correct sense of the word, the Confederate Government was never a *de facto* government.

It may well be doubted, whether in this country treason against the United States could be committed in obedience to a usurping President and Congress, exercising unconstitutional and unlawful power at the seat of the National Government.

Acts done under the authority of an insurgent body, actually organized as a government within a large extent of territory, not merely in hostility to the regular and lawful government, but in complete exclusion of it from the whole territory subject to insurgent control, when in hostility to the regular government, can not be recognized as lawful.

All transactions between individuals which would be legal and binding under ordinary circumstances, can not be pronounced illegal

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and of no obligation, because done in conformity with laws enacted or directions given by the usurping power.

Between these extremes there is a large variety of transactions, to which it is difficult to apply any general rule.

Transactions of the Confederate Government prejudicial to the interests of citizens of other states, excluded by the insurrection and by the policy of the National Government from the care and oversight of their own interests within the states of the confederacy, can not be upheld in the courts of the United States.

The Confederate Government can not be regarded as a *de facto* government in any such sense, that its acts are entitled to judicial recognition as valid.

The acts of the Confederate Government confiscating or sequestering property of citizens within the states adhering to the government of the United States, were null and of no effect.

In order for one who seeks to shield himself from liability upon the ground that the property was taken from him under the stress of *Vis MAJOR*, he must show that the property was set apart specially for the owner, and was taken from him without consent on his part, by force, either actual or menaced, under circumstances amounting to duress.

The P. R. R. Co. was a railroad company in the state of Virginia during the war. K., who resided in Philadelphia during that time, owned stock in it. This stock was confiscated by a decree of the District Court of the Confederate States, and certain dividends declared by the company were paid on this stock to a receiver appointed by the court without resistance or protest by the company. After the war began K. sued the company. *Held*,

1. The confiscation was wholly null and void.
2. The company are liable for the dividends declared during the war, but only for a sum equal to what the confederate money in which they were declared was worth at the time they were declared, with the interest from the time demand was made, which was from filing of the bill.

An excuse which would avail a carrier for hire for non-delivery, might excuse such a debtor from non-payment to his creditor.

The moment a dividend is declared by a joint stock company, the company becomes debtor, and the stockholder creditor for the amount payable on demand.

The confederate currency may fairly be said to have been imposed on the country within the control of the Confederate Government by irresistible force. The necessity for using this currency was almost the same as the necessity to live. The court is bound to take

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judicial notice of the fact that the dollars in Confederate currency were different in value to either description of dollars recognized as lawful money by the laws of the United States.

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Keppel was the owner of stock in the Petersburg Railroad Company, to the amount of thirty thousand four hundred dollars, prior to the year 1861.

The company was chartered by and running a railroad within the territory of Virginia.

Keppel was a citizen and resident of Pennsylvania, and the company having declared dividends during the war, payable to its stockholders, they were not claimed by nor paid to her.

The dividends were declared by resolution of the directors that a dividend of such a per cent. in dollars would be paid on such a day to all stockholders, and the dividends earned by her stock amounted in the aggregate to thirty-three thousand one hundred and thirty-six dollars.

While these dividends were being earned and declared, the Congress of the Confederate States had passed two acts, one providing for the issue of what were known as Confederate treasury notes, and the other declaring the process by which the property of enemies to the Confederate States might be sequestered and sold, and the proceeds of sale paid into the treasury of the Confederate States.

The first law was executed by the issue of the currency provided for, which at once went into general use and was received in all transactions between man and man. The railroad continued in the transaction of its business as a common carrier, receiving in pay for its services these notes which thus in course of time represented its entire earnings. The sequestration act was also enforced. The proper proceedings were had in the District Court of the Confederate States for the

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District of Virginia, for the sequestration of Keppel's stock, and it was condemned in due form of law, and sold by public auction. The proceeds of sale and the dividends earned, were paid into the treasury of the Confederate States.

After the war was over, the railroad promptly ignored this sale and acknowledged Keppel as the true owner of the stock, but declined to account for the dividends on the ground that they had already been paid over to the Confederate States, a government *de facto*, or of paramount force, and claimed that they could not be made liable to pay them over again, whereupon, Keppel having died in the meantime, her administrators, the complainants, filed their bill in the Circuit Court of the United States for the District of Virginia against the company, claiming to be paid the dividend *non obstante* the sequestration, and that they having been declared in dollars, must be paid in the only dollars known to the laws of the United States.

To this the defendant set up in defense the sequestration, and that the dollars meant Confederate currency dollars, which were greatly less in value than legal dollars of the United States.

The cause came on on bill and answer.

H. H. Wells, for complainant:—The complainants are the owners of stock in the defendant's road to the amount of thirty thousand four hundred dollars, upon which stock dividends were declared during the war amounting in the aggregate to thirty-three thousand one hundred and thirty-six dollars. They were not paid to the complainants, but it was claimed, and doubtless was true in fact, that certain proceedings were instituted in the District Court of the Confederate States of America, against the owners of this stock as "alien enemies," to sequester the same; that under the decree of that court the defendants paid to the

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Confederate Sequestration Agent the amount of the dividends so declared, and that the said agent sold the stock itself at public auction—but the defendants did not deliver it.

The case coming on to be heard upon bill and answer, the complainants insist that neither the decree of the said District Court of the Confederate States, the sequestration, nor the payment of the dividends under it, operated as a discharge of the liability of the defendants to the complainants.

The Confederate States authorities (so called) while regularly organized, holding possession of an extensive territory, bringing large armies into the field in defense of its claim of sovereignty, having an actual existence, and maintaining the attitude and semblance of a government, was not a government *de facto*, in the sense referred to, when we speak of a political power that has authority to confer civil rights and limit obligations, or, as applied to this case, that it could not relieve the defendant from a debt due to the complainants.

Whether the Confederate States (so called) are to be regarded as a political power, able to deal with civil and constitutional rights and obligations, is a political, and not a judicial question. It had only such character as the government of the United States might concede to or recognize it as possessing (*McIlvaine v. Coxe's Lessee*, 4 *Cranch*, 241; *Martin v. Mott*, 12 *Wheaton*, 19; 3 *Wheaton*, 246; *U. S. v. Palmer*, 3 *Wheaton*, 610; *The Divina Pastora*, 4 *Wheaton*, 52; *The Neustra Senora de la Ciudad*, 4 *Wheaton*, 497; *The Santissima Trinidad*, 7 *Wheaton*, 283; *Foster v. Nelson*, 2 *Peters*, 253; *Luther v. Borden*, 7 *Howard*, 1; *Kennett v. Chambers*, 14 *Howard*, 46; *U. S. v. 129 Packages*, 2 *Am. L. Reg., N. S.*, 419).

Neither the pretensions of the Confederate States to the rights of a sovereign state, nor the opposing claims of the United States, are to be judged of or decided by

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the rules found in the Law of Nations, because that code or body of unwritten law is a rule of conduct for, and applies only between, independent sovereign nations. Nor is the civil status of the Confederate States to be determined or affected by the view which may have been taken, or the recognition given by foreign nations or courts, for it is an internal question between a sovereign government and a portion of its own people, with which other governments or foreign courts have no right to meddle (U. S. v. 100 Barrels Cement, 3 *Am. L. Reg.*, 738).

The United States has never recognized the Confederate States as being such a political power, or as possessing the rights and functions of a civil government. It did, however, extend, from motives of humanity, perhaps from necessity, certain belligerent rights; but at the same time claimed to itself the full exercise of sovereign rights. And this granting to these States of such limited belligerent rights was not inconsistent with a total denial of civil rights, or of the validity of the acts of their organized legislatures (*Wheaton's International Law*, note, p. 83, 84; note, p. 377; Sec. 297; *Dana's Edition*, 1866; *Filkins v. Hawkins*, 5 *Am. Law Reg.*, 1865-6, p. 160; *Schooner Brilliant v. U. S.*, 2d *Am. Law Reg.*, N. S., p. 343; *Prize Cases*, 2d *Black*, 673).

The Confederate States claimed that they had a right to exercise the powers and functions of a civil government as fully as they had assumed the form of such a government, and this as an independent State or sovereignty. They appealed to the wager of battle for a settlement of the question. The decision was adverse to their claim. And now, to give the effect claimed by the defendant to the decree of the Confederate courts, is to claim for a defeat what a victory alone could achieve.

All American courts are bound to treat each and all

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of the insurrectionary States as integral parts of the Union, subject at all times to its laws and Constitution, and the United States statutes furnish this rule of decision (U. S. v. 100 Barrels Cement, 3 *Am. L. Reg.*, *N. S.*, p. 748 ; Lucas v. Bruce, 4 *Am. L. Reg.*, *N. S.*, p. 95, 96).

From the foregoing propositions the following conclusions result :

The ordinances of secession are a nullity, for the allegiance which every citizen owed to the United States was so absolute that no State or convention, decree or ordinance, could relieve him from it.

The Confederate States, so called, were not, separately or in the aggregate, a body politic ; therefore the government could not declare war against them ; it could not recognize them, separately or together, as capable of making a surrender nor of legally performing any function hostile to the United States.

No general status of belligerency was or could be conceded, and while carrying on war the distinction was at all times preserved between acts of war and civil acts.

The acts of the organized Legislatures, the Congress and the Courts of the Confederate States, so called, were absolutely null and void, *ab initio*, affording no legal right, authority, or protection to the defendant. None of these proceedings, then, by their own force or authority, offer a justification for the non-payment by the defendant.

There are, however, a class of cases in which persons are excused from their wrongful acts, induced or resulting from a state of war ; that is, where they are not voluntary, but compulsory, the result of a *vis major*.

This is not such a case, for there was no actual force ; there was simply a void order of an illegal court. There is no penalty affixed to its disobedience, for a corpora-

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tion can not, like a natural person, be seized and imprisoned. The only remedy is a writ of distringas, the purpose of which is to distrain the corporation of its goods and chattels. No such writ or other compulsory process was issued.

The only compulsion which, under such circumstances, would be a justification, "is such actual overpowering force, present and exercised at the time when the act was done, as renders resistance impossible."

How far the foregoing propositions, or any of them, may be modified, in a case between parties resident at the time within the Confederate lines of military occupation, or civil jurisdiction, and who have voluntarily dealt with such other, in reference to the existing state of facts, it is not material to consider now—for this question arises between a non-resident—in relation to personal estate which follows the domicile of its owner.

The suggestion that the earnings of the road were received in Confederate notes, payable six months after the recognition of the independence of the Confederate States by the United States, and that the complainant can now only demand payment in kind, has no foundation or authority in law, for the duty of the defendant was from time to time to declare dividends out of its net profits, and dividends, when declared, become a debt due to the stockholders, and if the money is placed in improper securities, or deposited in banks which fail, the loss falls upon the corporation, not the stockholder. It is not for the corporation to claim relief because it has done for or dealt with worthless or illegal funds (*King v. Patterson Railroad Co.*, 5 *Dutcher*, 82, 504; *Scott v. Central Railroad and B. Co. of Georgia*).

William Green, for defendant:—In preparing for the judge's use a note of my argument, I shall commit

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to paper only the main points, trusting to his recollection for what is subsidiary or illustrative.

I. The late (so-called) Confederate States, as one federative whole, had a government which was complete and perfect in its organization. It enacted laws by its Congress, enforced them by its executive, and administered justice by its judiciary. And it maintained itself in arms against a most powerful opponent through a four years war, of almost unparalleled magnitude, being, during the whole of that quadriennium, zealously supported by most of the people domiciled within its territorial limits, and obeyed by them all, certainly so far as such obedience was necessary to constitute it a government. In a word, it was a government which only needed final success in arms to make it, just as it stood, no whit less a government than is now that of the United States. And had the war terminated in a treaty of peace, it would, without any change whatever in it, have been, relatively to the whole world, a permanent government, from its first formation, both in deed and in right.

In the words of GRIER, J., delivering a judgment of the Supreme Court of the United States at its December Term, 1862, "several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle" (2 *Black*, 673, *Prize Cases*). Had the decision been favorable to them, their right would have been established agreeably to their claim. It was adverse: the consequence whereof has been to withhold from their Confederate Government, *ab initio*, the character of a government *de jure*. But, nevertheless, it was a government *de facto*, relatively to the people under its sway, from the time of its assuming the reins, along with the power, of government over them, and relatively to the rest of mankind, from (at latest) the period of its first

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recognition as such by the government of the United States.

1. It was at some time or other a government *de facto*, and whether it had ever been recognized as such by the President, or by the Congress of the United States, or not, this United States court in a case properly raising the question (as the present case does) would be bound to decide that it was, upon the facts being established (as in this case they are) that were essential to constitute it such.

This proposition no way conflicts with any decision of the Supreme Court of the United States, although numerous cases have been on the other side cited from the reports of its decisions, as overruling what I thus advance. All of them are distinguishable from it. Most of them relate to foreign states, as to which I need say nothing. Only one of them relates to a state of this Union (*Luther v. Borden*, 7 *Howard* 1). In that case, one of the parties insisted that a Circuit Court of the United States should try for him a question, whether the government of the State of Rhode Island, holding the power and exercising the functions of government under its ancient Constitution, and which was indubitably the *de facto* government at the period in question, whether (I say) this government had ceased to be *de jure* such, in consequence of certain unauthorized proceedings of a malcontent party ; that precise question having been already decided in the negative by the Supreme Court of the state, under a new constitution, which, meanwhile, had regularly superseded all others. And the decision of the Supreme Court of the United States was, that the Circuit Court could not try the question for divers reasons. In the first place, it was altogether impracticable for a court and a jury to go through such an investigation ; the thing was not feasible. And, in the next place, it was a political question for the state authorities to determine, whose conclusion

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would be final to the authorities of the Union, subject only to the qualification presently stated, and which, in that particular case, was not adverse ; therefore the decision (above mentioned) of the Supreme Court of the state was binding upon the Circuit Court, and even upon the Supreme Court of the United States. In two cases only,—provided for by the fourth section of the fourth article of the constitution of the United States,—was the general government authorized to interfere in the domestic concerns of a state (7 *Howard*, 42), and the nature of the functions then to be performed necessarily referred the decision in those cases to the political, not the judicial, department of that government. But those are not cases involving any question touching the relations of the United States as a government on the one hand, and any state of the Union as a distinct government on the other, *inter se*. And neither the decision in *Luther v. Borden*, nor the decision in any other case which has been cited, or is known to me, negatives the right and the duty of an United States court to decide upon the character of such relations, at any rate, if it do not decide counter nor previous decision by the political department. This is agreeable to the rule stated *arguendo* by Mr. Dana (2 *Black*, 665, *Prize Cases*), and in effect affirmed by GRIER, J., and the majority of the Supreme Court (*Id.* 667), in these words: “As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history, which the court is bound to notice and to know.” Compare *Id.* 666–667.

Conformably to this were the decisions made by STORY, J., in the *United States v. Hayward*, 2 *Gallis*, 485, and by the Supreme Court in *United States v. Rice*, 4 *Wheat*. 246, that Castine in the then district, now state, of Maine was a foreign port, and not subject to the laws of the United States, while, from Sep-

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tember, 1814, to February, 1815, it was held as conquered territory by Great Britain, though the political department of our government had not in any way defined its character in that *interim*.

That department of the United States government has never decided that the Confederate States had not a government *de facto* quite as early as I have any occasion to contend in this case that they had. And, therefore, this court would be bound to hold the affirmative upon that point, because it is in fact true, even though such department of the government of the United States had never recognized the truth of such affirmative.

2. It has, however, given such recognition by deeds, more emphatic than words, at sundry times and in various ways, and for that reason also the court should hold affirmatively this point. To keep the present discussion within reasonable bounds, I shall select but a few instances thereof.

(1.) It has done so by seizing and retaining large amounts of property, real and personal (for example, buildings near this city formerly used for the purpose of a magazine, and gold claimed by the banks of this city), on the ground of their having belonged to the government of the Confederate States ; the sole ground on which it could possibly have any right to seize and retain them. And it has afforded such recognition, even more unequivocally, by claiming, as plaintiff in a chancery suit, on the same ground, a large amount of cotton, which it had never seized, but which, having left the port of Galveston before the downfall of the Confederacy, had arrived in England subsequently to that event. This cotton the United States government claimed as their absolute property. The defendant in the suit, on the other hand, claimed a lien upon it by force of an agreement made between him and "the duly authorized agent at Liverpool of the Confederate

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Government'' before its downfall. And the court held that the plaintiff was entitled to the cotton, subject to the lien, upon the ground that the government of the Confederate States had been a government *de facto*, and that, if it had not been so, it would not have been possible that the plaintiff could have any right to the cotton. The judgment pronounced contains a most lucid exposition of the subject, to the whole of which I solicit attention, and especially to the following passages: "Whenever a government *de facto* has obtained the possession of property as a government, for the purposes of the government *de facto*, the government which displaces it succeeds to all the rights of the former government, and, among other things, succeeds to the property they have so acquired." And again, "although the United States, who are now the government *de facto* and *de jure*, claim it as public property, yet it would not be public property, unless it was raised by exercising the rights of government" (11 *Jurist*, N. S., part 1, page 792, *United States of America v. Prioleau*, 33 *Law Journ. N. S.* ch. 7, same case).

The recognition made in the manner thus instanced was, that the government of the Confederate States had been a government *de facto* from some indefinite period; and if the government of the United States has not in some mode ascertained definitely the period from which the former was such government, the court must take it to have been from the first moment when it possessed every attribute of a government that it possessed at the last. This was, at latest, from the period of its first getting into complete governmental action. How early that was acknowledged to be the fact by the government of the United States, the cases next to be cited will evince.

(2.) In the several cases reported (2 *Black*, 635-699) under the collective name of "Prize Cases," the government of the United States recognized that the Con-

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federate States had a *de facto* government prior to May 17, 1861, the date of the earliest of the captures in those cases, by seizing and causing to be condemned as prize of war, vessels and cargoes for attempted breach of blockade of ports in the Confederate States; but in some of them, the cases of the *Amy Warwick* and of the *Crenshaw*, more emphatically, by capturing and causing to be condemned as such prize vessels and cargoes that belonged to residents within the Confederate States, merely because by such residence, in contemplation of law, they were enemies of the United States. For the sake of simplification, I propose to separate these from the rest of those cases, and to confine to them my comments upon the decision of the court, and upon the dissenting opinion of four of the judges.

Let me premise, that traitors and rebels, as such, are not in contemplation of law enemies (1 *Hale*, 159). And the indifference is not merely verbal, but is attended with most important practical consequences, some of which are pointed out in *Bac. Abr. tit. Treason* (G., vol. 6, p. 516, Wils. ed. vol. 7, p. 600, ed. Lond. 1832), and others in 3 *Inst.* 10-11. One of these was illustrated upon the trials of the rebels, who surrendered at Carlisle in 1745, and who, it was held, were incapable of making terms of capitulation, as enemies could have done (Townley's case, *Foster*, 7; 18 *How. State Tri.*, 348, same case). What has been held in regard to the capitulation of General Lee's and General Johnston's armies in the late civil war the court knows.

Traitors and rebels, so long as they continue to be merely such, can not involve, in any legal consequences of their own guilt, innocent and loyal subjects or citizens, who merely continue to reside at their homes where they were domiciled before the breaking out of a rebellion. But when they become themselves invested with another character, of enemies, whether by substitution for their former character of traitors and

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rebels, or by superaddition thereto, then they can, to certain purposes, impart their character of enemies, not their character of traitors and rebels, to such (other) subjects or citizens as I have described, and thus expose them, innocent and loyal towards "the parent sovereign" though they be, to loss of their property by capture as prize of war (*See 2 Black, 693-695, Prize Cases*).

In a passage of Mr. Justice GRIER's opinion in those cases (*2 Black, 673*) which was certainly not necessary to the judgment he was pronouncing, and which understood as a link in the chain of his argument, was, I respectfully submit, not conceived and expressed with due caution, it is said: "Treating the other party as a belligerent, and using only the milder modes of coercion, which the law of nations has introduced to mitigate the rigors of war, can not be a subject of complaint by the party to whom it is accorded as a grace, or granted as a necessity." Doubtless. But who constitute "the other party" not entitled to complain of such treatment? The traitors and rebels. They can not complain of being elevated into the more favorable condition of enemies. No such persons, however, were before the court in those cases, either to complain of or to laud the treatment they had received. In the cases of the *Amy Warwick* and of the *Crenshaw*, the claimants who were before the court were, on all hands, conceded to be loyal citizens; no way tainted with the guilt of treason or rebellion. These parties had a right to complain, that traitors and rebels infesting their section of the country were, for the nonce, regarded as enemies, with the disastrous consequence to them (the claimants before the court) of rendering their property lawful prize of war, unless in truth they were, in the eye of the law, the law of the United States, enemies, and, moreover, enemies with established government and territorial jurisdiction over them (the claimants).

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Accordingly GRIER, J., in other parts of his opinion, takes pains to show that such was actually the status.

In one place, addressing himself (as it would seem) more directly to the captures for attempted breach of blockade, but not without an *intuitus* towards all the cases then simultaneously receiving judgment, he said : “ The law of nations contains no such anomalous doctrine as that which this court are now for the first time desired ” by the counsel that argued against the legality of the captures, “ to pronounce ; to wit, that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors ” (2 *Black*, 670). In another place, speaking of the argument of counsel for the claimants in the cases of the *Amy Warwick* and of the *Crenshaw*, he says : “ They insist that the President himself in his proclamation admits that great numbers of the persons residing within the territories, in possession of the insurgent government, are loyal in their feelings, and forced by compulsion, and the violence of the rebellious and revolutionary party and its *de facto* government, to submit to their laws and assist in their scheme of revolution ; that the acts of the usurping government can not legally sever the bond of their allegiance,” &c., &c. (2 *Black*, 672). And not denying, but admitting, the truth of these premises, he disproves the conclusion sought to be deduced from them, that therefore the property of the claimants in those cases was not liable to capture as a prize, by bringing forward and applying a principle explained and illustrated at large in Mr. Dana's admirable argument. It is there shown, that the principle and the reasons whereon it is founded are the same in regard to both international and internal wars—(wars as distinguished from mere insurrectionary commotions)—and as to the latter it is said : “ The object of the sovereign

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is to coerce the power which is organized against him and making war upon him. This power exercises jurisdiction and control *de facto*, and claims it *de jure* over the territory" (2 *Black*, 655). "The test is, whether the residence of the owner is under the established *de facto* jurisdiction and control of the enemy" (*Id.* 658.) The words of GRIER, J., or rather those of them which seem to me most forcible, to this effect, are found in a passage of considerable length (*Id.* 673-674), only the latter part of which I shall quote, for the sake of offering some remarks upon it. "This rebellion," he said, "is no loose, unorganized insurrection, having no definite boundary or possession. It has a boundary, marked by lines of bayonets, and which can be crossed only by force. South of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile, and belligerent power. All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors."

In using these expressions, Mr. Justice GRIER could not have forgotten—what immediately follows them (in the report) evinces that he did not forget—the character which the claimants in the cases of the Amy Warwick and of the Crenshaw were admitted on all hands to bear. And, therefore, he must have intended to be understood as meaning, not that "all persons residing" within the territory described had actually "cast off their allegiance" to the United States, but only that they had constructively done so by reason of the several seceding states having (in his own words) "acted as states" in organizing the rebellion. In other words, that such state action of itself, and without their personal participation, made every man, woman, and child,

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domiciled within the described limits, an enemy in law, whether loyal or disloyal in fact. This it could have accomplished only by force of governmental authority. Traitors it could by no means make out of such as preserved their individual loyalty, how much soever those may themselves have been traitors, who were active in thus wielding the *de facto* power of government.

The four judges, who dissented from the decision of the court, held that neither such action of the states, nor any action of the President of the United States, unsanctioned by the previous authority of Congress, nor both combined, could invest traitors and rebels with the character of enemies, so as consequentially "to convert a loyal citizen into a belligerent enemy, or confiscate his property as enemy's property" (2 *Black*, 695). Yet even they were of opinion that an act of congress, approved July 13, 1861, "recognized a state of civil war between the government and the Confederate States, and made it territorial," comprising "Georgia, North and South Carolina, part of Virginia,"—that is, as well as I remember, all east of the Alleghany mountains,—"Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida" (*Ibid.*). They, therefore, held that captures "before July 13, 1861, for breach of blockade, or as enemies' property" were "illegal and void" (2 *Black*, 699), but they concurred with the rest of the court in holding that such captures, after the date just mentioned, would be legal and valid. And so it has been held in repeated instances since, whether the captures were at sea, as in the cases I have been commenting on, or upon land, as in the case *Mrs. Alexander's Cotton* (2 *Wallace*, 404).

All the judges of the Supreme Court, in all the reported cases, have agreed that to validate such captures, especially of "enemies' property," there must have existed at the respective times of making them, a territorial civil war. This, in the nature of things,

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could not be without a *de facto* government of the Confederate States. I pause not to discuss whether civil war could or could not,—because it is absolutely certain that territorial civil war could not,—exist without such government. Then only would exist the condition of things described in the following passage of an able publicist (*Bello, quoted in Editor's note to Wheat. Internat. Law, ed. Bost. 1863, p. 524*), “when one faction or party obtains dominion over an extensive territory, gives laws to it, establishes a government in it, administers justice, and, in a word, exercises acts of sovereignty, it is a person in the law of nations;” and then all persons residing within such territory, whatever their personal predilections or individual conduct, become enemies in law to whomsoever such government is enemy. This alone could have been the ground on which it is was held, in the very case of the *Amy Warwick*, by Judge SPRAGUE in the District Court of Massachusetts (whose decree therein was affirmed by the Supreme Court in the Prize Cases), “that in those states whose state organization had recognized the Southern Confederacy, all the inhabitants were, as to captures, to be treated as enemies, without reference to their individual action—even where a new state organization, as in Virginia, had been [subsequently] formed and recognized by the Federal Government as representing the whole state, the senators of which were admitted, as such, into the senate of the United States; the distinction being between citizens of a loyal state, like Kentucky or Missouri, where armed bands might make hostile invasion, and hold divided, contested, or precarious possession of portions of it, and such a state as Virginia, which, by the act of its [then] established government, approved by a majority of its citizens, had placed itself in war with the Federal Government” (*Editor's Note to Wheat. Internat. Law, ed. Bost*

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1863, p. 563). I have somewhat shortened a long quotation, but without (as I think) altering its sense or effect. To render the doctrine of it more accurate, I would suggest an alteration of it so as to make the last clause, instead of "such a state as Virginia," &c. read "such a district of country as that part, cis-Alleghany, of the state of Virginia, which had been both, by the acts of its then established government, placed within the Southern Confederacy, and, by the *de facto* government of the latter, kept and held within its actual territorial limits," in like manner as Castine, with most of the country that lies east of the Penobscot river, had been kept and held, in the war of 1812, under the *de facto* dominion of Great Britain.

In the Prize Cases, the Supreme Court agreed with entire unanimity, that a territorial civil war, defined by the boundaries I have mentioned, had existed from July 13, 1861 (5 *Americ. Law Reg. N. S.* 154), the dissenting judges holding that it then first existed (2 *Black*, 695, 696); the rest of the court, that it had existed months before, and, at latest, from April 27, preceding (*Id.* 695). Either date will suit the purposes of my present argument; since the sequestration act of the Confederate Congress was approved August 30, 1861, and the proceedings under it, now in question, took place at a still later period.

(3.) Other authorities, of divers grades, support the conclusion, that a *de facto* government of the Confederate States existed and was recognized by the government of the United States; but such of these as I desire to bring to the notice of the court, are authorities also for another proposition, and, therefore, I postpone for the present any mention of them. Under this head I shall further notice only those authorities which the plaintiff's counsel has cited as impugning that conclusion. These are, certain cases of (so-called) Pirates; a case of *Filkins v. Hawkins* (5 *Americ. Law*

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Reg. N. S. 160); and a case of *Lucas v. Bruce* (4 *Americ. Law Reg. N. S.* 95).

i. As to the cases of alleged piracy by cruizing against the commerce of the United States, under commissions granted by the government of the Confederate States to privateers; no report of them has been produced, nor (I believe) can any be found in this city. The best account of them and of the whole subject, that I have seen, is in Mr. Lawrance's Note to *Wheat. Internat. Law, ed. Bost.* 1863, p. 246-254. There it appears, that the question being debated in the British House of Lords, on May 16, 1861, Lord Derby and all the law-lords present, Ex-Chancellor Brougham, Ex-Chancellor Chelmsford, the then Chancellor, and Lord Kingsdown, formerly distinguished at the bar and as one of the judicial committee of the privy council, under the name of Mr. Pemberton Leigh, delivered their clear opinions, which no one gainsaid, that such privateering by citizens of the Confederate States would not be piracy *jure gentium* (See also *Id.* 643 647, 778, *n*). And this seems to have been Mr. Justice NELSON's opinion upon the trials at New York before him, in which, it is observable, no conviction took place. In the trials at Philadelphia, before Mr. Justice GRIER, four individuals were convicted, but none of them were sentenced; so that, practically, the doctrine was never enforced, that such privateering was even piracy against an act of the Congress of the United States. Both of those judges seem, indeed, to have held that it was; but upon what ground either of them was of that opinion, I have not been able to learn. Possibly they may have held, that no valid commission could be granted to privateers, at least as against that act of congress, unless by a government *de jure*; for privateers, in depredating upon the commerce of citizens or subjects of the parent sovereign, have this in common with robbers, that

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whatever either of them perpetrate is perpetrated *causa lucri*. Certainly there appears, in all that I have seen concerning those trials, nothing like an intended negation of the palpable fact, that the Confederate States had a *de facto* government at an early period in 1861 ; though possibly not complete, in all the attributes of such a government, as early as the date of the commissions to those privateers, the precise date of which I have not been able to discover. These cases, therefore, present a very feeble opposition (if they present any) to the conclusive array of authorities, which I have already marshalled and shall in the sequel enlarge.

ii. In the case of *Filkins v. Hawkins*, it is true, BATLETT, J. (of a Circuit Court in Arkansas), is reported to have held that the late government of the Confederate States had never been a government *de facto* ; but this was altogether an extrajudicial opinion, and therefore not an authority. The question before him was, whether, after the downfall of the Confederate States, an execution could issue upon a judgment of a court, which court itself fell along with the Confederacy. This was a point too plain to admit of any doubt ; for it is clear, that a government *de facto*,—one that is merely such, and not also *de jure*,—can not impart, what after its own extinction will be a continuing enforceability, to judgments, decrees, or sentences, which then remain unexecuted. And the judge actually put his decision, rightly, upon this ground, so that what he said afterwards, upon the other point, was a mere *gratis dictum*.

iii. The case of *Lucas v. Bruce* contains not even so much as a *gratis dictum*, distinctly put, in opposition to the doctrine I maintain. The real ground of the decision in it is stated by the judge himself, in these words: “The doctrine of belligerent rights gives no power to the enemy to take, with impunity, the property of a citizen or subject of an invaded country ;

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no sovereign power, even acknowledged by all the world, can give such authority'' (4 *Americ. Law Reg. N. S.*, 98). And this seems to be true, with reference to such a case as then was before the court; in which damages were sought to be recovered for first taking possession of, and afterwards destroying, the plaintiff's buildings,—acts, not in accordance with the lawful usages of what is technically called just war, but in plain violation of them. Nor does the judge there cite, as authority for anything beyond this, the South Carolina case of Whitaker's admrs. v. English (1 *Bay*, 15). Moreover, that case is, in truth, good authority for nothing. It was a mere jury-trial, before a single judge, as early as April, 1784, of an action against one of the South Carolina tories; against whom, as we know from history, the most intense and sublimated hate, for their loyalty towards "the parent sovereign," was at that period and long afterwards cherished as a laudable feeling by the triumphant party. The defendant, whose misfortune it was to fall at such a time into such hands, had very small chance of justice. And certain it is, the law was wrested—I do not say corruptly wrested—against him. Possibly what he had done, by command of his superior officer, in taking private property for the use of the British army, no part of which had been appropriated to his own emolument, might have been indefensible, for the same reason as was the tort which was complained of in the case of *Lucas v. Bruce*; but that point was not at all noticed: And, without any inquiry concerning it, the jury were, in effect, instructed (doubtless the result would have been the same, if they had been merely permitted) to find against the defendant; notwithstanding he claimed the protection of the late treaty of peace. The judge held that that protection extended only to criminal prosecutions, not to civil actions; directly contrary to the decision of a more respectable tribunal

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in New York, in the case of Rutgers v. Waddington, reported by General Alexander Hamilton, who was counsel in it (1 *Americ. State Papers, Foreign*, 369-370, *ed. Bost.* 1819), and stated, with approving comments, in Mr. Jefferson's letter to Mr. Hammond (*Id.* 293-295; 3 *Jeff. Works*, 403-404, *ed. New York*, 1856).

II. As, in civil war, all persons residing under the established jurisdiction and control of a *de facto* government are liable to be treated as enemies in law to the government *de jure*; so the same persons are entitled to perfect legal immunity for whatever they do, during such war, in support of, or in obedience to, much more when it is done by compulsion of, the *de facto* government over them, provided only the thing done be not contrary to the lawful usages of just war.

1. I have demonstrated at large, to the entire satisfaction of the plaintiff's counsel, as avowed in his reply to my oral argument,—and therefore I shall not here repeat the steps of the demonstration,—that according to the common law of our transatlantic ancestors, respected and observed from time immemorial, except by the Yorkists under Edward the Fourth at the commencement of his reign, and which, on account of that deviation, was re-asserted by parliamentary declaration (11 *Hen.* 7, c. 1) in 1494, since which time there has never been in England even so much as an attempt to depart from it, the partisans and adherents of a king *de facto*, for their support of him against a competitor who, by prevailing in the struggle, establishes his claim to be king *de jure*, can not be punished as traitors: And that, as this doctrine is founded upon the most solid reasons, which are even more applicable among us in America, than ever they were among our ancestors in England; so the doctrine itself is entitled to be here, even more than there, considered sacred and inviolable. Every reason which exists there (as displayed in *Bac. Gov.* part 2, p. 144, *ed. Lond.* 1739;

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and in 4 *Blackst. Comm.* 77-78), exists also here; with this intensification of that one, which springs from the people's inability to determine which is the *de jure* government,—at least as of the time preceding the close of our late civil war,—that the very structure of our complex system of federal and state governments has, through a long period, led the most acute political reasoners and the best informed statesmen among us into differences of opinion, touching the right of secession, as sincere as they were irreconcilable. What has been settled respecting it by “wager of battle,” to use Mr. Justice GRIER's expression,—for the time to come,—is now perfectly well understood. But heretofore very many persons in all the states, more especially during late years in the states of the South, were convinced that a majority of the people of any state, through a majority of regularly delegated deputies in convention, had a right to withdraw their state from the Union of the United States, and that, if the Government of the United States made war against such seceding state for that cause, it would be a war without the shadow of justification. Others, in great number, believed that if any state seceded in the manner I have just described, although it would afford cause of war to the Government of the United States, just or unjust according to the nature of the occasion which led to such secession, yet the citizens of the state would owe their primary allegiance to it, and, by faithful adherence to such allegiance, could only become enemies, never traitors, to the Government of the United States. Perhaps a majority of the people of the Southern States held, as an article of their political faith, the former of these doctrines; almost all the rest of them held the matter. And even the Supreme Court of the United States, in the very heat and fervor of the civil war, in the same sentence wherein they declared “the citizens owe supreme allegiance to the Federal Government,”

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yet added, "they owe also a qualified allegiance to the state in which they are domiciled;" with a most pregnant addition in the next sentence: "Their persons and property are subject to its (the state's) laws" (2 *Black*, 673, *Prize Cases*).

Such having been our peculiar political relations, and such the diversities of honest opinion concerning them, it surely can not be doubted, upon calm reflection, now, when the passions excited by the war have in a good degree cooled down, that after the seceding states had established a *de facto* government of the Confederate States, and after it had assumed steadily the reins, with the power, of actual government, the citizens subjected to its sway could not, by voluntarily supporting it, become traitors or rebels against the government of the United States. Whether those who brought about a secession of any of the states were guilty therein of treason, and, if they were, whether the subsequent establishment of a *de facto* government of the Confederate States purged away that guilt, are questions with which no purpose of my present argument requires me to meddle. The defense I am here to maintain is unembarrassed with doubts or difficulties of that nature.

2. Immunity for acts done, in support of, or in obedience to, such *de facto* government, by citizens of the Confederate States, during the civil war, and according to the lawful usages of just war, extended, not only to public prosecutions of the government of the United States, but also to private suits of citizens of the latter. This point was decided, while the war was still being waged, in a court of the loyal state of Kentucky, then under the ligeance both *de facto* and *de jure* of the United States. The case,—*Hughes v. Litsey* (5 *Americ. Law Reg. N. S.*, 148), was as follows. The plaintiff alleged that, in July, 1862, the defendant and a number of other persons, banded together for the

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purpose of making war upon the government of the United States, came into the county of Washington, Kentucky, and took from the plaintiff two mules and harness and a wagon, with an averment that the same were taken by the defendant and the others aforesaid to be used, and were used, to haul and carry guns and ammunition belonging to said band and used by them in executing their common purpose aforesaid. *Prima facie* this, indubitably, was a good cause of action; for such seizure by traitors and rebels would have been an indefensible trespass. But the court held that a good defense was presented by the plea: Which stated, "in substance, that before and at the commencement of the present civil war the defendant was a citizen and resident of the state of Texas, which state, by an ordinance of secession, withdrew from the government of the United States, and, with other seceding states, formed the so-called Confederate States of America, declared their independence, and appealed to arms in support of that declaration; that at the time of the adoption of the ordinance of secession, and ever since, the state of Texas, to which he owed allegiance, has had the civil and military power to enforce the ordinance of secession and compel all her citizens to obey the laws or orders of that state, and that the federal government did not and could not protect him in refusing obedience to the laws or orders of the state of Texas; that, in pursuance of the civil and military orders or laws of that state, he was a private soldier organized into the army of the so-called Confederate States, and, together with about eight hundred others, marched by their military officers into the state of Kentucky; and that, in the prosecution of a public war between the so-called Confederate States and the United States, some portion of the Confederate army to which he belonged may have taken the property of the plain-

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tiff, but the defendant himself did not take, or advise, or aid, or assist in taking it."

Upon this plea—every part of which, material to raise the general question here discussed, is averred quite as strongly in the answer in the present case, and not denied,—the Court remarked: "It can not be doubted that, as a general rule of law, all persons who voluntarily join in an illegal undertaking are responsible for all injuries done by any of them in carrying out the common design; and it will be observed, that the defendant does not expressly aver that he was compelled against his will to join the Confederate army." Therefore, in conclusion of its comments upon the plea, the court said: "The question now presented for decision is, whether the rights or laws of war so apply between the two contending parties as to exempt the defendant from liability in a civil court for the injuries done to the plaintiff by the soldiers of the so-called Confederate States with whom he was united and co-operating." And this question the court decided in the affirmative; delivering an elaborate, very learned, and thoroughly reasoned opinion, in the course of which it was remarked that, according to the opinions of all the judges of the Supreme Court, the civil war had existed from July 13, 1861, anterior to the date of the trespass, or alleged trespass, complained of. This was deemed absolutely conclusive; and for the declared reason, that thenceforth a *de facto* government of the Confederate States must be taken to have existed, and moreover to have been recognized (as existing) by the government of the United States (See 5 *Americ. Law Reg. N. S.* 153–154).

The right of a loyal citizen to his private property was in that case invaded, without a possible justification or excuse, if the defendant was a mere traitor and rebel, or if he was acting under authority from mere traitors and rebels set over him; no such compulsion

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by brute force having been even pretended, as is described in a passage relied upon by the plaintiffs' counsel for another purpose, and which will be presently quoted from *Lucas v. Bruce* (4 *Am. Law Reg. N. S.* 96-97). Had the Confederate army been invested with no other character than such as belonged to the Western insurgents in 1794, the plaintiff must have recovered. And the government of the United States could not have taken away from him the right so to recover, by their "according as a grace" (2 *Black*, 673) any other character to the Southern "belligerents." As against him it was indispensable, that such other character should have been "granted as a necessity" (2 *Black*, 673), that is to say, as necessarily resulting from law, and that a law binding upon the local tribunals of the state of Kentucky; for the suit was instituted, as the court more than once pointed out in a tribunal of the state, not the United States. Such modification of the local law could be only by the proper authority, wielding control over the state's external relations, having recognized (in a manner obligatory on its citizens) the Confederate States as an existing and hostile *de facto* government; or (which seems to be the more correct view) by the veritable fact, whether the same had or had not been so recognized, that there was at the time such existing government, engaged in actual hostilities with the United States. A similar remark, in substance, has been before made with reference to the right of the United States to capture effects of citizens whose sole offense consisted in residing under the established *de facto* jurisdiction and control of the Confederate States Government; it now receives a more striking illustration, from this decision that the government just named could validly authorize its soldiers to capture effects of loyal citizens on the northern side of the "boundary marked by lines of bayonets" (2 *Black*, 674), provided only that it were done in accor-

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dance with the lawful usages of just war between independent nations.

3. *A fortiori* what was done under compulsion of the *de facto* government of the Confederate States was entitled to like immunity, within the limits of the proviso just now stated. To things of this class, more emphatically, the following extract from an opinion of the present Attorney-General of the United States, given at the requisition of the government, upon perhaps the most important occasion that has ever called forth an Attorney-General's opinion is applicable. This document, manifestly, was prepared with a caution and carefulness corresponding with the occasion. And in the course of it Mr. Stanbery says: "When an insurrection, by its continuance and power, takes the form of a *de facto* government, and prescribes and enforces laws over people within its territories, individual rights and obligations undergo an inevitable modification, and the rightful and displaced authority, when it again comes into place, must, in a measure, accommodate its action to circumstances, and consider many things as rightfully done, which, in a mere insurrection, would have no color of legality."—Doctrine, by the way, though perfectly correct, yet utterly foreign from the purpose, unless the Attorney-General was satisfied, as doubtless he was, that the late government of the Confederate States had been a *de facto* government, and moreover that it had been such in the contemplation of the present Congress; for it was applied by him towards ascertaining what they meant in a statute recently passed.

III. It follows, that, the dividends in question having been paid under compulsion of the late Confederate States Government, that fact is an absolute bar to the demand set up in this suit.

1. They had been paid, before the downfall of that government, and by compulsion of it; in that sense of

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compulsion, which is sufficient to maintain this defense. The passage cited by the plaintiff's counsel from 4 Americ. Law Reg. N. S. 96-97, *Lucas v. Bruce*, is inapplicable. It is there said: "There is no doubt, if persons are compelled by a power not to be resisted, and which is immediately applied, they will be excused for what would otherwise be a trespass on their part. But this force must be upon the person, and it must be an actual compulsion that can not be resisted, and have continued all the time. They must have joined 'pro timore mortis et recesserunt quam cito potuerunt.' " No doubt this is so, where the compulsion is that of mere brute force, without any mixture of governmental authority, and is set up as an excuse for doing what, as it is said in the same case, "no sovereign power, even acknowledged by all the world, can give authority" to do (*Id.* 98). Here the compulsion was by governmental authority, which could not with impunity be resisted; and it was to do what a government *de facto* had authority to command, provided it were done (as in this case it was) before such authority became extinct by the downfall of the government itself.—
For

2. A *de facto* government, cheerfully supported by the majority of the people subject to it, can not have less of governmental authority over all so subject, than an usurping conqueror has, to whom the people of the country reluctantly submit. An eminent jurist, indeed, has already suggested a parallel between them. "When," says he, "the people of a republic are divided into two hostile parties, who take up arms and oppose one another by military force, this is civil war. Supposing that the rebellion is but partially successful, and the old government maintains itself in one part of its territory, whilst it is obliged to surrender another [temporarily], shall it then give law where it has no power to enforce obedience, or shall its authority

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be [for the time] confined to the territory which it occupies? A revolutionary party, like a foreign belligerent power, is supreme over the country it conquers, as far and as long as its arms can carry and maintain it" (*Opinion of Black, Att. Gen. U. S. 15 May, 1858; quoted in Editor's note to Wheat. Internat. Law, ed. Bost. 1863, p. 575*). In truth a conqueror, after he has become (in the language of publicists) a regent, does exercise, in propriety of speech, government; which, while his usurpation continues green, is only *de facto*, but may, by long-continued possession, ripen into government *de jure*. This change, of a mere conqueror into the established regent of a country (3 *Phillim. Internat. Law* 690-691), may be effected "by the submission of the conquered people to the new government, indicated, either by some public act of the state, or by the fact itself, evidenced by the tranquillity of the people [under the government of the conqueror-regent], their obedience to the laws [of his enforcing], and, above all, by the quiet administration of justice [under his rule] in the proper civil tribunals:" Circumstances, whereof every one existed, in combination, to fix upon the late government of the Confederate States the character of a *de facto* regent, or regnant power.— And

3. If the dividends in question had been paid under the authority of an usurping conqueror, in like manner as they were paid under authority of the late Confederate States government, such payment would have been a sufficient defense against the demand set up in this suit. I take this method of making good our defense, by arguments *a pari* if not *a fortiori*, from doctrines which are established; because such has been our former felicity, that heretofore the precise question has not, for want of occasion, received a solution among us, and, in the civilized countries of the Old World, the *de facto* governments, that have occasioned similar

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questions, have been those which were founded on conquest.

(1.) Let us examine the doctrine established in regard to debts. These are *quoad hoc* of two kinds; public, or due to the state; and private, or due to individuals: And I am necessitated to notice them both, and in this order, because my author first expounds the doctrine as to public debts, and then applies the same to private.

i. After stating that, "if the debts due to a state be actually situated in the country of which permanent possession is taken and over which an *imperium* is exercised, it is clear that, if these debts are actually collected from the debtors, they fall within the *imperium* of the conqueror; Dr. Phillimore says: "Assuming that the conquest has subsided into government, the conqueror been changed into the regent, and yet that after a lapse of time the former sovereign and the former government return, and, having returned, claim at the hands of their debtor the payment of the debt, which he has discharged during the *interregnum* to the sovereign or government *de facto*; does it follow that, if this [*de facto*] sovereign and government had the right to exact the debt, it was the debtor's duty to pay it? Are the two propositions convertible? Or, if so, may not the original creditor demand a second payment?" And, having put these questions, he thus answers them: "Bynkershoeck says, that the debt is satisfied and extinct. And such is unquestionably the opinion both of the greater number and of the most able jurists; such is the conclusion from many analogies of the Roman law; such is the language of treaties." He then subjoins: "But in order to arrive at this conclusion of law respecting the extinction of the debt paid by the state-debtor to the executive authority *de facto* of the state, founded upon conquest, certain conditions are required by reason, justice,

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practice, and the analogies of positive, especially Roman, law. These conditions are as follows:—1. As a general rule, the public authority, to which the debt is paid and from which a receipt is taken, should be that to which the country is actually subject at the time of the payment; it must, as has been said, be the established authority of a regent grafted upon the bare right of a conqueror.—2. If, however, the payment be made to a mere conqueror, it may nevertheless be valid; but then a burden of proof lies upon the debtor to show—(1.) That the sum was actually paid;—(2.) That it was due at the very time it was paid;—(3.) That the payment had not been delayed by a *mora* on the part of the debtor, which had thus operated to defeat the claim of the original creditor;—(4.) That the payment had been compulsory,—the effect of a *vis major* upon the debtor,—not necessarily extorted by the use of physical force, but paid under an order the disobedience to which was threatened with punishment;—(5.) That the constitutional law of the State recognized the payment to the conqueror as such,”—to wit, as payment; that is to say, that the payment to the conqueror was so made as that by the fundamental law of the state it would have been a valid payment, if made in like manner to the government *de jure* (for it is mere absurdity to talk of the constitutional law of any state providing for the payment to a conqueror “as such,” to wit, as conqueror, of debts due to the state);—or, in the terms of Hallack’s paraphrase, “that the constitutional law of the state recognized the payment, as made by him [the debtor] to be valid; in other words, that it was made in good faith, and to the *de facto* authority authorized by the fundamental laws to receive it” (3 *Phillim. Internat. Law* 693, 696–698; *Hall. Internat. Law*, ch. 32, sect. 27, 28). Whatever the true construction of this fifth requisite may be, certain it is, it must be such as can consist with the main

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proposition to which it is incident—that “payment made to a mere conqueror may be valid.”

ii. In a subsequent part of his work, Dr. Phillimore says: “The question as to the right to confiscate the public debts of a state has been already discussed; and, generally speaking, the principles relating to this subject are the same as those which relate to the confiscation of private debts. It has been stated, in an earlier part of this volume, that the right of confiscating the private debts of an enemy is a corollary to the right of confiscating his property. That, however rigorous and inexpedient the application of this *summum jus* may be, it is nevertheless competent to an enemy to exercise it. That this position is supported by the reason of the thing, and by the authority of jurists and judges on the continent of Europe and in the United States of North America. Nevertheless,” he continues, “in 1817, the English Court of King’s Bench made a decision wholly at variance with these authorities.” He then states, and remarks upon the case of *Wolff v. Oxholm* (6 *Maule & S.*, 92–106); and concludes his strictures by saying (*inter alia*), “the decisions of the American, Dutch, and German courts (none of which, strange to say, were quoted), appear much sounder; and perhaps, if the occasion should present itself, the decision of Lord Ellenborough [therein] might be reversed in England” (3 *Phillim. Internat. Law*, 720–725). The American authorities to which he refers are the opinions of the judges in *Ware v. Hylton* (3 *Dall.* 199); and Judge STORY’s opinion in *Brown v. United States* (8 *Cranch*, 139–143); reported also (1 *Gallis*, 576–580); wherein one other judge expressly concurred with him, and which is not impugned by the contrary judgment of the majority, founded on another and wholly distinct ground. To these might have been added Mr. Jefferson’s vindication of the same doctrine, on which (furthermore) our ancestors practiced in the

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war of the revolution (1 *Americ. State Papers, Foreign*, 261, ed. Bost. 1819 ; 3 *Jeff. Works*, 369, ed. New York, 1856). And accordant with Phillimore's condemnation of the decision in *Wolff v. Oxholm* is Wheaton's and also Halleck's disapproval of it (*Wheat. Internat. Law*, part 4, ch. 1, sect. 12 ; *Hall, Internat. Law*, ch. 15, sect. 17-20).

(2.) Even more favorable to the defense is the real case, than if the dividends in question had been debts due to the plaintiffs. In truth they were in the nature of income from permanent property, namely, shares of the capital stock of a company, whose railroad was located wholly within the Confederate States, to wit, in Virginia, east of the Alleghany Mountains, and in North Carolina. The case is, therefore, analogous to that of real estate ; concerning which, we are told, "In cases where the income of the estate would otherwise be sent out of the country to augment the resources of either the public or private wealth of the enemy, it may be sequestered during the pendency of the war" (3 *Phillim. Internat. Law*, 135). Here it was not confiscated, but sequestered in the very terms of the act of the Confederate Congress, set out in the answer. And, as also stated therein, the stockholders, in their first general meeting after the close of the war, unanimously resolved that the sale of the sequestered stock by order of the Confederate States government (through its judiciary) should be regarded as a nullity from the time of the downfall of that government. But the dividends which accrued during the war, and were actually paid during the war, under compulsion ; these the stockholders think that the company should not a second time be compelled to pay.

The counsel for the plaintiffs argued, indeed, that compulsion can not be practiced upon a corporation. But, however true this may be concerning such compulsion as is necessary for excusing from the conse-

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quences of an act, which otherwise would be tortious, and which no governmental authority could sanction ; it is not true concerning that species of *vis major*, which, being brought to bear upon a debtor (corporation or individual), without physical force, is sufficient to render valid even a payment to the conquering, though not yet regent, power. "An order, the disobedience to which was threatened with punishment," suffices for this ; and in our case there was such order, accompanied from its very nature with such threat. The corporation was not bound, before it rendered obedience, to wait for a *distringas* to be laid upon its effects, with the ruinous consequences of such a proceeding against a railroad company. Nor was its president or any other officer bound to subject himself to process of contempt from the court, or himself or the company to the very severe penalties menaced in the Sequestration Act of the Confederate Congress. Besides which, the *de facto* government of the Confederate States being, not a mere conqueror, but (for the time) an established regent, even a voluntary obedience to it would entitle to complete immunity.

IV. But should the court not sustain that defense, to which all the foregoing propositions relate,—at any rate the plaintiffs are not entitled to recover more than the value of the dividends at the time they were demanded ; that is to say, the value thereof after the close of the war ; at which time the currency (to wit, Confederate States treasury notes), wherein the dividends had been earned, declared, and paid to every stockholder that received his, had become of no value : *

* This precise point in respect to dividend of a bank, declared during the war, and not claimed until after it was over, was decided by Judge PARKER, upon full consideration. See transcript of record of the case before him, filed with Brent's answer in the suit of Merchants National Bank of Baltimore, *et al.* v. Valley Bank, *et als.*, pending in this court, wherein (see pp. 56-58) his reasons for the decision are

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And for want of a demand, which admitted of payment in that medium or of that value, before this suit was brought, the suit ought to be dismissed.

1. Dividends, in their nature, do not constitute (in any proper sense) a debt from the company to the respective stockholders, at least until payment of them has been demanded and refused. They are the quotients of the gains made, which, in a division thereof, fall to the share of each stockholder, in proportion to his amount of stock, and it is his business to come forward and get his share, not that of the company to seek him and pay it. The company therefore is a mere depository for him after a dividend is declared (as it was for all the stockholders before), and bound to no more or other duties in his favor *quoad* his dividends, than any other bare depository would be;—not his debtor, at least before it has failed to meet his demand for payment thereof; and when it has so failed, it is at most his debtor thenceforth, not with a relation backwards to the time past. These conclusions are sustained, both by principle and by the authority of decided cases (*King v. Paterson, &c. R. R. Company*, 5 *Dutcher*, 82, stated in 22 *U. S. Dig.* 141, pl. 59-62; and *State of Maryland v. Baltimore, &c. R. R. Company*, 6 *Gill*. 363, 387-388).

2. The company, being such depository, was neither bound nor even at liberty to convert the Con-

given. And such was his opinion, though he held in the same case that the Confederate States treasury notes, deposited generally, would create the relation of debtor and creditor between the bank and the depositor; in opposition to which it was then contended, and is to be hereafter contended in the suit above mentioned in this court, to wit, that if those notes had in themselves on the indicated vice that no transaction based on them would create an indebtedness. This doctrine I am to oppose in that case, and if I am to be beaten upon it there, then I claim the benefit of it here for the Petersburg Railroad Company, which for other reasons would owe the plaintiffs nothing.

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federate State treasury notes it held for each stockholder into any other form of circulating medium, or into any other description of property. Suppose a stockholder had received his dividend in such notes, and then deposited the same with a mere bailee to keep for him ; it surely will not be pretended, that the depository thus constituted could be bound to do more than return the same notes upon demand. Let them appreciate, or let them depreciate, it would no way concern him, to gain in the one case, or lose in the other. And the case must be the same with the company.

3. Which being so, the present suit can not be maintained at all,—not even to recover the Confederate States treasury notes,—for want of a previous demand, admitting of satisfaction by payment of them, or of their value when such demand was made (6 *Gill*. 363, 387–388). The principle is the same as in the case of a factor (as to which see 24 *Wend*. 203, *Cooley v. Butts*); or in the case of an executor in respect of a legacy (concerning which see 3 *Pick*. 213, *Miles v. Boyden*); or rather the defense is (if any difference) stronger in this case than in those.

In conclusion, I respectfully crave indulgence for the defects and imperfections of this note by reason of the present disorder of my health ; confidently trusting that, whatever faults of expression may be found, a candid consideration of the several parts will, without difficulty, make of them a consistent whole.

CHASE, Ch. J.—This is a suit by the administrators of a stockholder of the Petersburg Railroad Company, who was a citizen of Pennsylvania, and resided in the city of Philadelphia during the late rebellion, to compel that corporation, created by the statutes of Virginia and North Carolina, and having its principal office for business at Petersburg, to account for dividends declared by the company during 1861, and sub-

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sequently before the filing of the bill on November 22, 1866.

According to the statement of the answer, admitted to be true by written stipulation of counsel, Catharine C. Keppel, before the rebellion, was the owner of two hundred and three shares of the company's stock, and subsequently, by further issues of stock, became entitled to one hundred and one additional shares, making a total of three hundred and four shares.

After the secession of Virginia, and organization of the Southern Confederacy, the company submitted, without opposition, to the control of the Confederate government set up over North Carolina and that part of Virginia in which the road lay, in hostile exclusion of the constitutional authority of the United States.

Subsequently, on August 30, 1861, the Confederate Congress passed an act for the sequestration or confiscation of all property found within the rebel states belonging to loyal citizens of the other states of the Union.

Under this act, such proceedings were had by a district judge holding a court under the pretended authority of the Confederate government, and by a receiver appointed by him, that ninety shares of Mrs. Keppel's stock were sold to sundry purchasers, and dividends were paid on the whole number of shares, partly to these purchasers and partly to the receiver.

These dividends amounted to one hundred and nine per cent., and were paid at different times from July, 1861, to November, 1864, inclusive.

After the overthrow of the Confederacy, the sales made by the receiver were treated as nullities by the railroad company. Scrip for the one hundred and one additional shares was sent to the complainants, as administrators, and if dividends had been subsequently declared, payment would have been made to them in the whole three hundred and four shares.

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It appears from this statement that the company itself regarded the confiscation act as null and of no force, so far as the sale of the ninety shares were concerned.

That sale was treated as a nullity, and the title of the purchasers under it as worthless.

But the company claims—1st. That payments of dividends, made under the same act, to the receiver and the purchasers, must be upheld as valid payments; and 2d. If this claim be disallowed, then that the liability of the company was only to pay, on demand, the dividends of Mr. Keppel, in such currency as was necessarily received, and no demand having been made except by the commencement of this suit after that currency had become wholly worthless, no decree can now be made against the company.

The first of these propositions rests upon the premises that the Confederate organization was a government *de facto*, and that acts in obedience to its authority must be presumed to have been done under the compulsion of superior force, by reason of which the actors are discharged from all ulterior responsibility.

Of this it may be observed, in the first place, that the term *de facto*, as descriptive of a government, has no fixed and definite sense.

It is, perhaps, most correctly used as signifying a government completely, though only temporarily, established in place of the lawful or regular government, occupying its capital and exercising its power.

Examples of this kind of *de facto* governments are found in English history; some in the violent seizure and temporary possession of royal power, and one, so conspicuous that the world can never lose the sense of it, in the establishment of the commonwealth and the protectorate in place of the monarchy.

In this sense certainly, the rebel government was never a *de facto* government. It never held the national

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capital. It never asserted any authority to represent the nation. It was only what it professed to be, a revolutionary organization, seeking to establish a Confederacy of states, disconnected from the United States, and dependent wholly for success upon the success of the revolution.

The term, however, is often used, and perhaps more frequently, in a sense less precise, as signifying any organized government established for the time over a considerable territory, in exclusion of the regular government.

A *de facto* government of this sort is not distinguishable in principle from other unlawful combinations. It is distinguishable in fact mainly by power, and in territorial control, and by the policy usually adopted in relation to it by the national government.

Treason in England is not committed against the lawful government by acts of hostility done in support of a *de facto* government, strictly so called.

This is the rule established by the statute, 11 Henry VII., passed with influence to the frequent changes in the royal authority during the civil wars of York and Lancaster.

And the reason of the rule, doubtless, extended to acts done under the parliament and the protector, while in possession of the supreme authority in England; though the benefit of it was denied to many, and in a most conspicuous instance to Sir Henry Vane. And it may be well doubted whether in this country treason against the United States could be committed in obedience to a usurping president and congress, exercising unconstitutional and unlawful power at the seat of the national government.

But it can not be maintained that acts against the king committed in obedience to a usurper temporarily in possession of a part of the kingdom, would not be treason in England; or that levying war against the

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United States by persons, however combined and confederated, (even though successful in establishing their actual authority in several states), would not be treason here.

What effect, then, is to be given to acts done under the authority of an insurgent body, actually organized as a government, and actually exercising the powers of a government, within a large extent of territory, not merely in hostility to the regular and lawful government, but in complete exclusion of it from the whole territory subject to the insurgent control? It is not easy to give a general answer to this question. On the one hand it is clear that none of its acts in hostility to the regular government can be recognized as lawful; on the other, it is equally clear that transactions between individuals, which would be legal and binding under ordinary circumstances, can not be pronounced illegal and of no obligation, because done in conformity with laws enacted or directions given by the usurping power. Between these extremes of lawful and unlawful, there is a large variety of transactions to which it is difficult to apply strictly any general rule; but it may be safely said that transactions of the usurping authority, prejudicial to the interests of citizens of other States excluded by the insurrection and by the policy of the National Government from the care and oversight of their own interests within the states in rebellion, can not be upheld in the courts of that government.

In the case before us, for example, Mrs. Keppel was the undoubted owner of three hundred and four shares of the stock of the Petersburg Railroad Company, and was clearly entitled to her just proportion of its earnings. But she was denounced as an alien enemy by the Confederate Government. She was excluded from all control of her stock, and all receipt of dividends. And more than this, the stock was

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sequestered, or rather confiscated, and partly sold, and the dividends paid to the purchasers, and to a person called a receiver, appointed under the rebel authority. Can it be maintained that her right to the dividends upon her stock was defeated by these transactions? We think not. We can not regard the Confederate Government as a *de facto* government in any such sense that its acts are entitled to judicial recognition as valid. On the contrary, we are obliged to regard it as a combination or unlawful Confederacy organized for the overthrow of the National Government, and its acts, for the confiscation or sequestration of the private property of the citizens of the United States, as null and of no effect. The appointment of the receiver, the sales of the stock, the payment of the dividends, must all be regarded as part of the process of sequestration or confiscation, and all as equally void.

But it is said, admitting the character of the Confederate Government, in view of the law, to be such as has been stated, that the company was compelled to pay the dividends to the parties who received them, and by this compulsory payment was discharged of responsibility to the lawful proprietor of the stock.

This proposition asserts the exemption of the company from liability on the principle *vis major*: that there can be no responsibility where the loss is occasioned by irresistible force. And it may be admitted that if the dividends belonging to Mrs. Keppel had been set apart to her especially, and the money thus set apart had been taken from the officers of the company without consent on their part, by the application of force, either actual or menaced, under circumstances amounting to duress, the loss must have been borne by her. After such an appropriation of dividends, the company would have become, perhaps, the bailee of the stockholder for her proportion, and an excuse

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which would avail a carrier for hire for non-delivery, might excuse the company for non-payment.

But we can not agree that this rule is fairly applicable to this case. It does not appear that there was any setting apart of dividends, or that any force was actually used or threatened. On the contrary, the action of the company in employing their railroad in the service of the Confederate Government, and the absence of any protest on the part of any of its officers against the unlawful payment of the dividends, afford a reasonable inference that they were not involuntary accessories to the whole action of that government. No reasonable application of the principle relied upon, therefore, will excuse the company from its liability to its stockholders. And public policy clearly requires the protection of stockholders in the loyal states from any application of this principle not clearly demanded by the law. Mrs. Keppel was deprived of the immediate security, afforded to her rights by the National Government, by the rebellion. It is the duty of that government, since that rebellion is suppressed, to afford her, as far as practicable, ultimate security. On the other hand, it is the obvious dictate of sound policy that no encouragement should be given to rebellion by relieving parties within rebel control of private responsibilities, except in very clear cases of compulsory force, without their direct or indirect consent.

We think the second claim of the company as to payment in Confederate notes equally untenable. The liability of the company to Mrs. Keppel for each dividend accrued when it was declared. At that moment the company became debtor, and the stockholder creditor, for the amount. It may have been the fault of neither that payment was not then made.

It was not, certainly, the fault of the stockholder. It is no excuse to the company that the particular currency in which its income was received, and in which

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its dividends were paid to the stockholders, has since become worthless. The dividends were declared in dollars. The debt created by the dividend to the stockholder was due in dollars. And in dollars only can it now be discharged.

But we are not more ready to say that it must now be discharged by dollars of greater value than those in which it was received, than to say that it may be discharged by dollars of no value at all.

At the time several of the dividends were declared, the chief currency, and when the others were declared, almost the entire currency of that part of the country in which the railroad was operated, was in Confederate notes; and whatever currency of bank notes there may have been in circulation, was of no greater real value. This currency may fairly be said to have been imposed on the country by irresistible force. There was no other in which the current daily transactions of business could be carried on, and there could be no other while the rebel government kept control of the rebel states. The necessity for using this currency was almost the same as the necessity to live. No protest, no resistance, no rejection, could avail anything. At the same time, this currency, though it depreciated rapidly, had a sort of value. Its redemption, though improbable, was not impossible, and, until the downfall of the Confederacy, it had a greater or less degree of purchasing power.

Under these circumstances, we can not refuse to take notice of the fact that the dollars which the company received were not of either description of dollars recognized as lawful money by the laws of the United States; nor can we hold the officers of the company as incurring any liability to the stockholders by receiving the currency actually in circulation for its earnings, beyond that of prompt payment in like currency to such stockholders as were in a situation to receive such

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payment; and payment as soon as practicable in currency of equivalent value to such as were resident in the states, intercourse with which was, at the time, not only cut off by the civil war, but was also interdicted by the congress of the United States.

In the case of *Shortridge v. Macon*, it was held that the accrual of interest upon a note for a certain sum and interest was not suspended by the rebellion.

The dividends, in the present case, are in a different predicament. Dividends are only payable on demand, and it is agreed in this that there was no demand until the filing of the bill. Interest, therefore, can only be allowed from that date.

We shall decree, therefore, that the respondents pay to the complainants the dividends declared upon the stock of their intestate, with interest from November 23, 1866. The amount of the several dividends at the several dates when made, will be computed by deducting such percentage as will reduce them to equal value in lawful money, and interest on the aggregate amount will be cast from November 23, 1866, to this date, at six per cent.

And decree will be entered for the sum thus ascertained.

The computations may be made by the counsel, or by a master, as they may prefer.*

* As the preceding is a case of special interest and importance, the case of *Newton v. Bushong*, decided by the Supreme Court of Appeals for the state of Virginia, at the Fall term, 1872, involving the same questions, is appended here. See also the case of *Perdicaris v. Charleston Gas Light Co.*, *ante*.

Newton v. Bushong—B., a resident of Indiana, during the late war, had a legacy which had been left him which came to the hands of N., executor, in July, 1861 (and which was deposited in bank to the credit of N., executor), and reported by the executor to a confederate receiver and confiscated under the confiscation acts of the Confederate States. *Held*:

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First. That in a suit by B., against N., since the war, to recover this legacy, N. was not liable.

Second. That the citizens of the Confederate States were obliged to obey its laws and mandates, just as much as the citizens of any other government are, and that "contracts made, rights vested, payments made, liabilities incurred, and duties and obligations performed" under those laws are as valid and binding as those made under any other government.

Third. The Confederate government was a government *de facto* in the highest sense of that term.

Query.—Was it not a government *de jure*?

Judge WALLER R. STAPLES delivered the unanimous opinion of the court as follows :

The important question in this case relates to the legacy of Samuel Bushong, a resident of the state of Indiana. This legacy was in March, 1862, reported by the executor to a Confederate receiver, and was confiscated as the property of an alien enemy. According to the statement of the executor, the fund had been in his hands since July, 1861, part of the proceeds of personal property belonging to the testator. . . . There is no evidence of the executor's assent to or participation in the act of confiscation. On the contrary, it is to be inferred that he only made the report and payment because he was ordered to do so by the proper authorities. The question is now presented whether the payment thus made protects the executor against the claim of the legatee? In order properly to discuss this question the acts of confiscation or sequestration passed by the Confederate Congress must be briefly noticed. The first of these was passed August 30, 1861; the second, amendatory thereof, February 15, 1862. It is unnecessary to state in detail the various provisions of these acts. It will be seen by reference thereto that it was made the duty of every person having in his possession or under his control the effects of an alien enemy speedily to inform the receiver in his district of the fact. A failure so to do was declared a high misdemeanor, punishable by fine and imprisonment, and also a forfeiture of double the amount at the suit of the government. It was also provided that any person who, after giving such information, should fail to pay over and deliver on demand made by the receiver the money or effects in his hands should stand in contempt, and be proceeded against as in other cases of contempt; and the court or judge was authorized to imprison the offender until he should fully comply with the requirements of the act. Under the provisions of the original act the court was empowered to leave the sequestered property or effects in the possession of the debtor or other person, requiring security for its safe-keeping and

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payment or delivery whenever required by the court. The amended act, however, makes a very material change in this respect. That act creates a distinction between persons in actual possession of or having under their control the effects of alien enemies and persons owing debts to alien creditors. In the former case immediate payment or delivery was required to be made to the receiver without qualification or condition. In the latter case payment of interest was only exacted, and no execution could be issued during the war against the debtor who faithfully complied with the statute in giving information of his indebtedness. The reason of this distinction is apparent. . . . In this case the fund was deposited in bank to the credit of the executor, and was, therefore, under his control. He was within the express terms of the law, and the question is, Was he bound to obey it? It will be observed that these provisions were of a highly stringent character; that the Confederate Government had the power to enforce them, no one familiar with the history of that period will question. It was a government of paramount force, to whose laws and mandates every citizen within its jurisdiction was constrained to yield implicit obedience; indeed, this was conceded in the argument. It was said, however, that this government was an unlawful and treasonable organization, and that no act done under its authority prejudicial to the rights of the loyal citizens of the United States can be recognized as valid by the courts. In support of this view, an opinion of Chief-Justice CHASE, delivered at Richmond in "Keppel's Administrators v. The Petersburg Railroad Company," is relied on. It seems that Mrs. Keppel was a stockholder in that company, and that a part of her stock was confiscated and sold during the war. In a suit against the company by Mrs. Keppel's administrators the company claimed a credit for the dividends paid the confederate receiver and to the purchasers of the stock sold. The learned Chief-Justice conceded that if the dividends belonging to Mrs. Keppel had been set apart to her specially, and the money thus set apart had been taken from the officers of the company without their consent, either actual or menaced, under circumstances amounting to duress, the loss must have been borne by her. But nothing of the kind appeared; no dividends were set apart; there was no force, actual or threatened. On the contrary, the conduct of the company afforded a reasonable inference that they were not involuntary accessories to the whole action of the government. The facts of the case are not reported in the volume to which we have been referred. It is therefore somewhat difficult to understand what is meant by the expression "application of force, actual or menaced, under circumstances amounting to duress." We are not told how far the person

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holding the effects of an alien enemy was required to go; what amount of resistance he was expected to display in defense of property belonging to a loyal citizen of the United States. A government of supreme authority denouncing the penalties of fine, imprisonment, and forfeiture upon acts of disobedience to its proclaimed will affords as strong an illustration of "menaced force" as can well be imagined. What does it matter that such a government is unlawful? A citizen may be justified in resisting tyranny and oppression, but he is under no obligation, nor can he be required to engage in a hopeless and dangerous contest with the government under which he lives, however illegal it may be, in defense of property confided to his care, either as bailee, agent, or executor. In *Thorington v. Smythe* (8 Wall), Chief-Justice CHASE declared that obedience to the authority of the Confederate Government in civil or local matters was not only a necessity but a duty. Why should a different rule be established with reference to this executor? Had he refused to pay over the money, every one familiar with the history of that period and the temper of the public mind knows well that the whole power of the courts and the law would have been exerted against him to enforce obedience. What was he to do under such circumstances? How far was he to go in his resistance to the law? Was he to submit to fine and imprisonment? or would the threat of an attachment for contempt have excused him in surrendering the fund? I think the executor was well justified in refusing to incur these hazards—he wisely declined a contest with a government which the whole naval and military power of the United States could not subdue under four years.

We are not disposed, however, to rest the discussion of this case upon this narrow and restricted view. It may be placed upon a higher ground. In *Walker v. Christian* (21 Grat. 301), Judge MONCURE, speaking for the court, said: "It is immaterial to inquire whether the Confederate Government was *de jure* or *de facto* only, and if *de facto* only, for what purposes and to what extent it was a *de facto* government; that it was such a government, to a considerable extent and for many purposes, if not entirely and for all purposes, can not be denied." It is said, however, by an eminent Federal judge, that the Confederate Government did not possess all the attributes of a government *de facto* in the highest degree. The reason he assigns is, that it never expelled the regular authorities from their seats and functions; it never held the national capital; it never asserted any authority to represent the nation. The conclusion he adduces, therefore, is that it must be regarded as an unlawful organization, and all its acts and proceedings for the confiscation of property of loyal citi-

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zens must be treated as absolutely null and void. Now, the test here suggested may be a correct one where applied to a people having but one central, consolidated government. In such states or communities, as a general thing, the object of every revolutionary movement is to overthrow and expel the existing government, to occupy the capital, and give laws to the nation. So long as the organization falls short of this result it may be a question whether it possesses the attributes of a *de facto* government in the highest degree. However this may be, the test suggested can not in justice be applied to the Confederate States. They did not attempt or desire to occupy the national capital as their seat of government, nor to give laws to the people of the United States. The whole scope and object of the movement was a separation from the northern States, the formation of an independent confederation, the establishment of a new government over their own people within their own territorial limits and jurisdiction. How eminently successful this struggle was, for four years at least, in the attainment of these objects let the Supreme Court of the United States answer.

In *Mauran v. The Insurance Co.* (6 Wall, p. 1), the question was presented whether a northern insurance company was liable for the value of a vessel captured by the naval forces of the Confederate Government. Mr. Justice NELSON, in discussing the principles governing the rights and liabilities of underwriters in such cases, used the following language: "Still it can not be denied but that by the use of these unlawful and unconstitutional means a government was erected greater in territory than many of the old governments of Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were conceded to it or were acquiesced in by the supreme government; such as the treatment of captives, both on land and sea, as prisoners of war, the exchange of prisoners, their vessels captured recognized as prizes of war and dealt with accordingly, their property seized on land referred to judicial tribunals for adjudication, their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers, the same as in open and public war." Again, elsewhere he declares: "We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country, and hence captures under its commission were among those excepted out of the policy by the warranty of the insured." All will

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acknowledge the force of this description, the accuracy and truth of the picture. If the laws and mandates of a government thus organized and powerful will not protect those who were subject to its jurisdiction and yielded it obedience, it is idle to say that the citizens or subjects of a mere *de facto* government in any case can claim exemption under its authority. In *Thorington v. Smith*, Chief Justice CHASE expresses the opinion that the Confederate Government may be classed among the governments of which Castine and Tampico are examples. Let us see, then, what was decided with reference to Castine. It was an American port, captured by British forces in 1814, and held in possession of British authorities until the treaty of peace in 1815. During that period foreign goods were received into the port under regulations established by the enemy. Some of these goods remained in Castine until after the close of the war. The United States Government then asserted a right to levy imposts and duties upon them. The Supreme Court of the United States decided that this claim could not be sustained; that by the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty. At the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and enforce. Now, if the learned Chief Justice be correct in likening the Confederate Government to the military occupation of Castine, it would seem that the same results must follow in both cases. The law of paramount force, which protected the citizen against the claim of the United States, would also protect the bailee or fiduciary who had surrendered the fund in his hands to the supreme authority of the country. In such case it does not matter that such authority is denounced as unlawful and treasonable. The same thing may be said of every *de facto* government. It is unlawful because it is simply *de facto*. The right to confiscate the property of enemies during war does not depend upon the lawfulness of the government which enforces it; it is derived from a state of war, and is called the right of war. Accordingly, when things in action are confiscated, peace being made, those which are paid are deemed to have perished, but those not paid revive and are restored to their creditors (*Ware v. Hylton*, 3 *Dallas*, 227; *Vattel lib.* 3, chap. 8, § 188, and chap. 9, § 161). In the Prize cases (2 *Black*, 686), the doctrine that the parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms was fully recognized and sustained. It was also there held that the civil war between the United States and the Confederate States attained such character and magnitude as to give to the

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United States the same rights and powers which they might exercise in the case of a national or foreign war. Among these was the right to blockade southern ports against neutral nations, the right to treat as public enemies all persons residing within the territory controlled by the Confederate authorities, and to seize and confiscate their property. These were declared to be the belligerent rights resulting from a state of war, applicable alike to civil and to foreign wars. It was upon this principle that the United States seized and confiscated the cotton of Mrs. Alexander, a widow lady, residing in the state of Arkansas, who did not even sympathize with the people of the south in the struggle for independence. The Supreme Court of the United States sustained the act, declaring that the personal dispositions of individuals inhabiting enemies' territory can not, in questions of capture, be the subject of inquiry (2 *Wal.* 405). According to the law of nations, the justice of the cause being reputed equal between the two enemies, whatever is permitted to one by virtue of a state of war is also permitted to the other (*Vattel*, 882). It does not matter how the struggle terminated, who the victors and who the vanquished, the question is not one of right, but of power appertaining to a state of war—power *flagrante bello*. The government of the United States may exercise both sovereign and belligerent powers. In its sovereign capacity it may punish treason by seizing and confiscating the property of the guilty party. This, however, can only be done by the conviction of the offender according to the forms and requirements of the constitution and laws. This guilt must be made to appear judicially. The constitution throws the shield of its protection around the citizen by declaring that no one shall be deprived of his life, liberty, or property, except by due process of law. When, however, civil war exists and the government asserts the rights of a belligerent, such as appertain to a state of war between independent nations, treating all the inhabitants of the opposing section as public enemies, blockading their ports against neutral powers, seizing and confiscating their property without trial and without conviction, it must be content to accept all the results which flow from the position thus assumed. In the Prize cases it is admitted by Mr. Justice GRIER that the parties in a civil war usually concede to each other belligerent rights. In the same cases, Mr. Justice NELSON, delivering a dissenting opinion, in which Judges TANEY, CATRON, and CLIFFORD concurred, said: "In the case of a rebellion, or resistance of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may, by the competent power, recognize or declare the existence of a state of civil war, which

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will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war;" and in defining the legal consequences resulting from a public war he declares "all the property of the people of the two countries, on land or sea, are subject to capture and confiscation by the adverse party, as enemies' property, with certain qualifications as respects property on land." In Wheaton the same doctrine is thus announced. But the general usage of nations requires such a war (civil) as entitling both the contending parties to all the rights of war, as against each other, as well as respects neutral nations (*Wheaton's Int. Law*, § 296; *The Tropic Wind Law Rev. July*, 1861; *Hughes v. Letsy*, 5 *Law Rev.* 148; *Price v. Poynter*, 1 *Bush (Ken.)*, 387; *Coolidge v. Guthrie*, *United States Circuit Court for the Southern District of Ohio*, vol. 8 *Am. Law Reg.* 22).

It has been urged here and elsewhere that the government of the United States might at the same time exercise both belligerent rights and sovereign rights; belligerent with regard to the opposing section, and sovereign in punishing individuals engaged in resisting its authority. It might be demonstrated, I think, that inasmuch as the war was carried on by sovereign states associated in a common confederacy exercising the highest attributes of government, no citizen taking up arms under the authority of that government and yielding obedience to its laws and mandates can be held amenable to the penalties of treason. It is, however, unnecessary for the purposes of this case to establish that proposition. Let it be conceded that the government of the United States, having reduced the people of the south to submission, has the right to treat them as rebels and traitors. The same may be said of every established government, and the argument carried to its legitimate results proves that in a civil war belligerent rights can only be exercised by the successful party. It may be that the laws of the Confederate Government can no longer be enforced, and that no person can claim exemption from punishment for treason under their authority; but what is to be said in respect to contracts made, rights vested, payments made, liabilities incurred, duties and obligations enforced, whilst such laws were in operation? The government of the United States was unable to afford any protection to this executor at the time of this transaction; its courts were not only closed against him, but he was declared an enemy of the United States, and his property liable to capture and confiscation by the authorities of that government. Whatever security he had against violence and wrong, whatever protection for person and property, was derived from the Confederate Government. Protection and allegiance are correlative obligations, as the citizen is justified in

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obeying the laws which protect him, so his rights and liabilities in civil and local matters must be tested and settled by the rules of the government that has dominion over him. The Government of the United States obtained many important advantages by the exercise of belligerent power during the war. It seized and confiscated millions of dollars worth of property belonging to southern citizens who had taken no part in the struggle. It was relieved from all responsibility for acts done on northern soil and on the ocean by the armies and navies of the Confederate States. Its blockade of southern ports was respected, and its right to exert against neutral commerce all the privileges of a party to a maritime war fully recognized. The people of the northern states approved this policy of their government, and reaped all the advantages flowing from it. For the losses they thereby sustained they must for redress look to the government which claimed their allegiance and which received their services. Considerations of natural justice and equity, the laws and usages of nations, require that the people of the south shall not be placed in the position of insurers of funds in their hands lost by the accidents of war.

In considering this case I have been content to concede that the government of the Confederate States was only a government *de facto*. Whether it was not during its existence something more, is a proposition in respect to which statesmen and jurists will differ so long as a trace of the struggle remains—so long as the fundamental principles of the government excite discussion among men. The decision of that question is not rendered necessary in any aspect of this case. Should it ever arise, I trust this court will meet it with the gravity and deliberation its importance demands.

Statement of the Case.

DISTRICT OF VIRGINIA.

May Term, 1868.

MOORE & BROTHER v. FOSTER & MOORE.

Any draft, bill, or note drawn in the Confederate States, or in any State, under the proclamation of the President declared in insurrection, or in any part of them (except such part as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the Federal lines, was absolutely void as to the maker and all other parties thereto, and was not to be received in payment or satisfaction of any debt due to a citizen of a state adhering to the government.

When such a draft has been received, the jury must be satisfied upon good evidence that it was accepted in satisfaction of the debt.

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In 1860, Foster & Moore of Norfolk, owed Moore & Brother of Baltimore, nine hundred and twenty dollars, due by negotiable notes, which fell due during the occupation of Norfolk by the Confederate army. After the evacuation of that city, Moore & Brother came to Norfolk, and Foster & Moore agreed to pay the amount of their liabilities to them in Virginia money, *i. e.*, the bills of Virginia banks. Foster & Moore then bought a draft for one thousand dollars, drawn by the Bank of Windsor, N. C., on the Bank of Portsmouth, Va. This draft was endorsed by Maury & Co., Smith of Norfolk, and other responsible parties, and made payable to the order of Moore & Brother, to whom it was sent.

They neglected to have the draft presented, and some two months afterward the Bank of Portsmouth ran its assets into the Confederate lines. They held

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the draft until 1867, and it was never paid. Under these circumstances, Moore & Brother brought suit upon the original notes, and tendered the draft back to Foster & Moore, who refused to receive it.

Gilmer & Son, for plaintiff.

Guigon and John Howard, for defendants.

The Chief Justice instructed the jury as follows :

1st. That any draft, bill, or note drawn in the Confederate States, or in any state under the proclamation of the President declared in insurrection, or in any part of them (except such part as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the Federal lines, *was void as to the maker and all other parties thereto*, and was not to be received in payment of any debt when due to a citizen of any state adhering to the government ; but there being a question as to whether the Bank of Windsor was, at the time this draft was drawn, in the Federal or Confederate lines, that question was for the jury to determine.

2nd. That the jury must be satisfied that the plaintiffs accepted this draft in satisfaction of the debt due them, upon good evidence.

The jury failed to agree.

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DISTRICT OF VIRGINIA.

May Term, 1868.

BOTTS & DARNALL v. CRENSHAW.

The late civil war did not revoke an agency established in one of the southern states before the war, by a citizen of one of the northern states.

An attorney in Virginia collected a claim entrusted to him before the war by a citizen of Kentucky, in Confederate money, during the war, and invested the same in Confederate bonds by order of a Virginia state Court. He is liable after the war for the value of the Confederate money, as of the date when he received it.

An order of the Hustings court of the city of Richmond, authorizing the attorney to invest funds collected by him for citizens of Kentucky, in Confederate bonds, which perished by the result of the war, will not be recognized in this court.

Statement of the Case.

This was an action brought by plaintiffs, citizens of Kentucky, against the defendant, a citizen of Virginia, to recover the amount of certain claims entrusted to him before the war, as attorney-at-law, for collection. It appeared that one Green owed the plaintiffs money, for which he gave them his negotiable notes, which fell due before the war, and were not paid by Green. The plaintiffs then sent the notes to Crenshaw, a practicing attorney of the courts of Richmond, Virginia, for collection. Green got into pecuniary difficulties after the war commenced, and when it was impossible for Crenshaw to communicate with his clients. Under these circumstances, he compromised the notes at eighty cents on the dollar, and received that sum in Confederate money, and subsequently finding it depreciat-

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ting on his hands, applied by petition to the Hustings court of the city of Richmond, a court of general equity jurisdiction, and which, with other courts of Virginia by an act passed in 1863, had special authority to order fiduciaries on their petition to invest trust funds in bonds of the state, or of the Confederate States, for authority to invest this money thus collected in Confederate bonds—which authority was given, the investment made, and the bonds perished with the power which created them.

CHASE, Ch. J.—The agency created by the plaintiff in the defendant was not terminated by the status of war. It continued with all its rights, duties, and obligations. It is for the jury to say whether this agency authorized the defendant to compromise this debt under the circumstances, and to recover payment of it in Confederate currency. If they find that defendant had such authority, then they must find the value of such currency, when defendant received it in gold, and render their verdict for the plaintiff for such amount. The order of the Hustings court of Richmond, ordering and authorizing defendant to invest the funds of the plaintiffs in his hands, they being citizens of a state adhering to the United States residing there, can not be recognized by this court, because it is an act in derogation of the rights of persons beyond the jurisdiction of the *de facto* government of Virginia, of which that court was a constituent part, and because it is an act, the tendency and effect of which is to sustain the course of the Confederate Government and aid it in its struggle against the United States.

Ordinary acts of government relating to marriage contracts, conveyances, wills, &c., done by the *de facto* government, will be sustained and enforced by the Federal courts ; but such acts as the one in question can not be.

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The jury found for the plaintiff the value of the Confederate currency in gold at the time of its receipt, and the court ordered the judgment to be entered generally for the amount so found.

Statement of the Case.

DISTRICT OF VIRGINIA.

IN RE WYNNE.

A mortgage or other conveyance made as a security for a debt evidenced by a note or word, will operate as a security for the same continuing debt, though the evidence of it be changed by renewal or otherwise.

But if one deed of trust be executed as a substitute for a preceding one, the former will at once cease to have any validity or effect.

An assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed, subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but the assignee represents the rights of creditors as well as the rights of the bankrupt; and any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee.

When the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into.

Though the bankrupt act purports to have been approved March 2, 1867, yet, as that day was Saturday, and it did in fact embrace Sunday and Monday, the bankrupt act did not become a law until the latter day.

Consequently, a deed of trust which was recorded on March 2, 1867, is not avoided by the bankrupt act.

Nothing in the thirty-fifth section of the bankrupt act affecting a deed, it may well be doubted whether, if the bankrupt act have been approved before the recording of it, its effect would have been altered.

It seems that as the Virginia statute against fraudulent conveyances avoids all deeds of trust as to creditors until and except from the time they are duly admitted to record, the assignee in bankruptcy would receive the benefit of that statute, and would take the property free from all claims under such deeds.

Statement of the Case.

It can not be held that all mortgages or other securities not expressly included in the first clause of the second general proviso in the fourteenth section of the bankrupt act are invalidated by that act. To hold such to be the law would give to the act an *ex post facto* operation.

A deed of trust is made on December 8, 1866, and is recorded March 2, 1867. The recording of the deed can not be held to be an act of bankruptcy, that being altogether the act of the party. So far as the grantor is concerned, whatever consequences flow from his act, must attach to the act of making the deed on December 8, 1866.

Nor is it to be regarded as a deed executed on the day of its recordation, and therefore as a deed creating a preference on that day, as against creditors.

It is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid.

It seems that knowledge that a party is embarrassed in carrying out his business for want of means, is not sufficient to fix on a grantee in a trust deed knowledge of his insolvency, if he fully believed that his property is more than sufficient to pay all his debts.

No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed in bankruptcy, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid law upon property, such jurisdiction will not be divested.

A lien is given to a landlord, of a high and peculiar character, by the twelfth section of chapter 128 of the code of Virginia, ed. 1868.

The landlord's lien under that statute, is given by the statute, independently of proceedings by distress warrant, or attachment, which are remedies, in case of a bankrupt, superseded by the effect and operation of the bankrupt act.

Statement of the Case.

Wynne executed a deed of trust in August, 1866, to secure certain debts due to Enders, Paine & Williams, and this deed was at the time of its execution delivered to the latter, but never recorded by them. Afterwards, in December, 1866, Wynne made another deed for the benefit of the same parties to secure the

Statement of the Case.

same debts as were secured by the unrecorded deed of August, which deed was likewise delivered to the *qui* trusts and held by them until Saturday, March 2, 1867, when it was recorded at their instance at four o'clock, P. M.

The Congress had during the preceding session been considering the bill entitled an "Act to provide a uniform system of bankruptcy," and its sittings terminated by law on Monday, March 4, 1867, at noon.

It appears from the statutes at large, that the bankrupt bill became a law by approval of the president on Saturday, March 2, 1867, while the official records of the Congress shows that the sitting of March 2 extended through Sunday, March 3, until Monday, March 4, at noon, and that the fact of the president's approval of the bill was communicated to the senate after nine forty A. M. Monday.

In this state of doubt as to when the law went into operation, Wynne was adjudicated a bankrupt on the petition of Wheelright, Mudge, & Co., on June 8, 1867, and June 10, ten days after, Haxall, the landlord of Wynne, levied a distress by warrant for rent in arrear on the goods on the premises, and on July 18, of the same year, he levied another distress by warrant on the same goods for rent which would become due on January 1, 1868, the law of Virginia allowing distraint for rent whenever due during the current year of the tenancy, under certain circumstances. Whereupon the contention arose between the general creditors who claimed that the Enders, Paine & Williams trust deed was void, being contrary to the provisions of the bankrupt law, and that Haxall could acquire no lien by virtue of a distraint made after the adjudication of bankruptcy, and consequently, as they asserted, there being no liens on Wynne's property, it must all be divided equally. The trust deed creditors claimed that they held a lien dating from August, 1866, or at least

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from December, 1866, and that it could in no wise be affected by the bankruptcy law, for the reason that the deed was valid in itself, and the law was not in fact passed until Monday, March 4, 1867, notwithstanding the official statute book stated that it had passed on Saturday, March 2, and the landlord asserted that his lien for rent by the law of Virginia was prior to all other liens, and that it was as perfect and complete without distraint as with it, and therefore he was entitled to be first paid, even if his distraint was void because made after the adjudication of bankruptcy.

On this state of the case, Johns, the assignee of Wynne, filed his petition in the district court for instructions as to the distribution of the funds in his hands, from whence the cause came up to be heard in this court.

Ould & Carrington, for the deed of trust creditors.

Page & Murrey, for the landlord.

John Howard, for the general creditors.

Ould & Carrington, for deed of trust creditors.—This case comes before the court on the application of John Johns, Jr., assignee of Charles H. Wynne. In view of the conflicting claims upon the property of the bankrupt, the assignee asks for instructions from the court as to the priorities of the litigating parties.

The indebtedness of Wynne, by the deed of the deed of trust creditors, existed as early as August, 1866. In that month a deed of trust was made to secure them, though that deed was never recorded. A subsequent deed was made on December 8, 1866, which was recorded on March 2, 1867.

The deed of August, 1866, as well as that of Decem-

Argument for Deed of Trust Creditors.

ber, 1866, was a preference in favor of certain creditors, which it was competent for Wynne to make, under the well-settled law of Virginia. This is not disputed by the other side. It could not be under the repeated decisions of the courts. Even if the grantor was in failing circumstances or insolvent, such a preference could have been made. But at the time of the deed of August, 1866, no one pretends that Wynne was in failing circumstances or insolvent. His difficulties came upon him after that time.

Under the well-settled law of Virginia, the renewal of a note is only an extension of credit for the former debt, and if the first note is secured by a deed of trust, the renewal note is also secured by the same deed, even if there is no express provision as to renewals. See *Farmer's Bank v. Mutual Assurance Society* (4 *Leigh*, 69). The real date, therefore, of the preference in this case in favor of Enders, Paine & Williams is August, 1866, and not December, 1866. And if the circumstances of the party making the conveyance become a material inquiry in this case, his condition in August would be the test. So if the knowledge of the preferred creditors is a material point, then the information they had in August when they accepted the preference, would be the real subject of inquiry. In other words, the preference in this case was not given in December, 1866, but in the August preceding, and the deed of trust of December was but a continuation and renewal of the preceding preference. The reason why the deed of August was not recorded, and why another deed was prepared and subsequently recorded, is fully explained in the answers of Enders and Paine, and not substantially controverted. According to our view of the case, it is not material whether the preference was made in August or December, as we hold that in either case it was valid. But in some of the aspects presented by the other side, it may become

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material to determine the true date of the preference, and in that view we insist that the true date is August, 1866. We trust we will subsequently show that a preference does not depend upon an act of recordation, and that it is as fully made without recordation as with it.

The answers of the several deed of trust creditors set forth under oath that they had the most perfect faith and confidence in the ability and solvency of said Wynne at the time of execution of the said deeds, and at the time that the deed of December 8 was recorded, and that they were at liberty at any time to record the said deeds. The reasons why the deed was not recorded are set forth. We submit that there is nothing in the proofs in this case to controvert these answers. But we hold that even if this is not the fact, their creditors are entitled to the lien of the conveyance in their favor. If the facts are in accordance with these answers, of course the case is with these deed of trust creditors. The first material inquiry is, whether the deed of December, 1866, is avoided by any provision of the bankrupt act.

We admit that there is one class of conveyances which are avoided by the provisions of the bankrupt law, whether they are made before or after the passage of the bankrupt act. They are those conveyances named in the fourteenth section of that act. "All the property, conveyed by the bankrupt *in fraud* of his creditors . . . shall in virtue of the adjudication in bankruptcy, and the appointment of his assignee, be at once vested in such assignee." Judge McDONALD, in the case of Bradshaw, assignee, v. Henry Klein, *et al.* (1st Bankrupt's Register, p. 146), thus accurately states the law: "On the whole, I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the

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bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration." But in order to bring the case within this fourteenth section, the conveyance must be fraudulent in fact. A mere preference by an insolvent debtor is not a fraud. It has never been so held. After the passage of the bankrupt act, all such preferences are made illegal and void, it is true, but they have never been held to be fraudulent in fact. Hence Judge McDONALD makes it as an essential ingredient of fraudulent conveyances, that there should not only be a fraudulent purpose on the part of the grantor, but that the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration." Now, there is no pretense that Enders & Co. were parties to any fraudulent intent, or that they received the transfer without valuable consideration. The transaction was the same that at that time was occurring daily in every county in the state to wit, a *bona fide* indebtedness, and a deed of trust to secure the creditors.

Nor was this deed of trust obnoxious to any other provision of the bankrupt act. The thirty-fifth section only reaches frauds on the bankrupt law, and therefore can only refer to preferences made after the passage of the act. Judge McDONALD, in the case already cited, so expressly decides. He says that while the fourteenth section refers to conveyances which are fraudulent under state statutes, and which may therefore extend to acts done before the passage of the bankrupt law, the thirty-fifth section only relates to acts which that section denounces, and that therefore it can only refer to preferences made after the passage of the act. The most cursory reading of the section, must satisfy any one that such is its meaning. The acts denounced are those "made in fraud of the

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provisions of this act," or done "with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act." How could such phraseology possibly apply to an act done or a conveyance made before the passage of the law? How could a conveyance be made "with a view to prevent his property from coming *to his assignee*," before any law was passed authorizing an assignee? How could a conveyance be "made in fraud of the provisions of an act," before that act was passed? How could a conveyance be made "with a view to prevent his property from being distributed under this act," before there were any provisions of law enacted, regulating distribution? Moreover, this thirty-fifth section only makes preferences void, where the creditor has reasonable cause to believe the debtor insolvent. This is utterly denied by the creditors, and is, we submit, not proved by the testimony. But even if this is not so, the case would not be altered. But it is contended that as the deed of trust was recorded on March 2, that being the day of the approval of the bankrupt act, such recordation is within the meaning and scope of the thirty-fifth section. It is alleged that as the act was approved on March 2, 1867, it brings within its scope any and every act done on that day. We will examine this position hereafter in the argument, and at present confine ourselves to the discussion of the very narrow question, whether the recordation on March 2 of a deed previously made, is denounced by the thirty-fifth or any other section of the bankrupt act. The statement of such a position, shows its utter absurdity. The only acts denounced by the thirty-fifth section are attachments, payments, pledges, assignments, transfers, and conveyances. Does the recordation of a security come under either one of these heads? Is it an attachment, or a payment, or a pledge, or an assignment, or a transfer, or

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a conveyance? Is it even a preference? Certainly not. The *preference*, the *assignment*, the *transfer*, the *conveyance*, was made in December previous, and as we have before shown, is not within the scope of the thirty-fifth section. In other words, this thirty-fifth section does not impose any penalty upon the recording of a conveyance, but does impose a penalty upon the *making* of the conveyance under a given state of facts. Its purpose and intent were to prevent the *debtor* from *making* assignments under certain circumstances, from and after the passage of the act. The deed of trust was no more of an assignment or conveyance after it was recorded, than it was before. It was just as much a preference or conveyance on December 8, 1866, as it was on March 3, 1867, after its record. Recording neither makes nor unmakes an instrument. It only renders void certain acts of the *debtor*, and does not relate to any act to be done by the *creditor*. If it had been the purpose of congress to render void an act already done—if it had been its intent to prevent a creditor from recording a deed already executed, there would have been some explicit mention of such purpose and intent on the face of the act. The force of the argument that the thirty-fifth section only refers to the acts of preference on the part of the debtor is so keenly felt, that the opposing counsel have been compelled to take the position that the recording of the deed by the creditor is an act of the debtor. The extraordinary ground is taken that a creditor records a deed given in his favor, by virtue of a verbal irrevocable power of attorney. If this position was correct, it would not meet the case, for the thirty-fifth section not only relates to some acts of the debtor, but particularly specifies what they are. It must be a payment, pledge, assignment, transfer, or conveyance. If the recording of a deed by a creditor is in law and fact the act of the debtor, is it such a particular act as

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is named in the section? Is it a payment, pledge, assignment, transfer, or conveyance? Certainly and clearly not. So that if the opposing counsel were to succeed in maintaining their point, it would amount to nothing, unless they further showed that the act of recording a deed was either a payment, pledge, assignment, transfer, or conveyance. But it is not true that the act of recording a deed by a creditor is the act of the debtor. The theory of the power of attorney is altogether fanciful. We might with just as much reason and propriety hold that a customer who pays to a merchant ten dollars for a barrel of flour, gives him an irrevocable power of attorney to buy a coat with the money, and that the investment of such sum in that way by the merchant to cover his own back, was the act of the customer. If the gravity of the case will allow the expression, we say that the position is ridiculous. The creditor in such a case is not the agent or attorney of the debtor. The interests of the two parties are adverse, which can never be the case in an agency or attorneyship. If a creditor has not the right to record a deed for his benefit, it is because he has contracted not to do so, and not because he has no such power as the agent or attorney of the grantor. In the present case, the evidence is plenary that the deed of trust creditors had the right to record the deed at any time, and that when they did record it, it was done as their act and not as that of Wynne. In the discussion of this matter we have assumed, for the sake of the argument, that the recordation was after the bankrupt act went into operation. But is such the fact? It is in evidence that the deed was recorded about four o'clock on the afternoon of March 2, 1867. The congressional term expired by limitation of law at high noon on Monday, March 4, 1867. The 3rd was Sunday, *dies non*. It is well known that under such a state of facts, the president attends the night session of

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Saturday for the purpose of approving the laws then enacted. We understand that the bankrupt act of 1867, after having been made the subject of conference, passed late on Saturday, and was approved many hours after the time of the recording of Wynne's deed. Nay, it is well known that all laws approved by the president bear date one day before they are announced as approved to the house in which they originated, except in the special case to which we have referred, when the president attends the night session of congress. It is the well-known practice of the presidents to examine ordinary legislation of congress on the night of the day on which the bills are delivered to him, and if they meet his approval to endorse that approval on them, as of the date of that day. They are then regularly on the following day reported to congress, but bear date the preceding day. Probably not one act in a thousand has been endorsed with an approval before four o'clock in the afternoon of the day on which it appears to have been approved. In the light of these facts, we call your honor's attention to "the matter of Joseph Richardson *et al.* (2 *Story*, 571). Mr. Justice STORY there held that the time of the day at which an act was approved might be inquired into, and if the fact appeared that a transaction took place before that hour, though on the same day, it was not affected by the act. He further held that if the matter was in doubt, and if it did not affirmatively appear whether the act was approved before the transaction occurred, the actors in the transaction should have the benefit of the doubt.

We now propose to examine this case in the worst possible light for the deed of trust creditors, and will take it as an admission, for the sake of the argument (although the proofs show otherwise), that Wynne was in failing or insolvent circumstances in August and December, 1866—that he knew that fact—that the deed of trust creditors knew that fact, that Wynne was in-

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solvent when the deed of trust was recorded, that the deed of trust creditors knew that fact also as well as Wynne, and that the date of the record of the deed of trust was subsequent to the approval of the bankrupt act. We propose to show by the clearest and most abundant authority that even under such a state of facts, the deed of trust creditors are entitled to have the lien of their deed enforced.

Nothing is more clearly settled as law in all the states, than that an unrecorded conveyance or assignment is good as between the parties to the instrument and their representatives. It is so by virtue of the contract between the parties. To use the language of the books, "it results from contract." This is a fundamental principle of the law, growing out of the expressed written stipulations of the parties, and upon which the very statutes which provided otherwise as to creditors and purchasers without notice, are based. Hence, the statute of Virginia recognizes this doctrine in providing for the protection of creditors and purchasers. "Every deed of trust, conveying real estate or goods and chattels, shall be void, as to creditors and subsequent purchasers for a valuable consideration without notice, *until* and *except* from the time that it is duly admitted to record." Without such a provision in the law, by virtue of the contract between the parties to the deed, the conveyance would be good as against creditors and purchasers, even *before* or *without* being recorded. If there was any doubt about this elsewhere, it is well settled in Virginia, by repeated decisions and by the concessions in reported cases, that as between the parties to a conveyance and their representatives, it is perfectly valid and effectual (*Glazebrook's Admrs. v. Ragland's Admrs.* 8 *Grattan*, 332; *McClure v. Thistle*, 2 *Grattan*, 182). Even the recitals in an unrecorded deed are evidence against the grantor and all claiming under him (*Wiley v. Givens*, 6 *Grat-*

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tan, 277). In *Johnson v. Slater* (11 *Grattan*, 321), the court of appeals says, "registration is not necessary between the parties to a deed ; that it is not necessary as against volunteers or purchasers with notice."

If the doctrine of the opposite side be true, we are thrown into singular absurdities. On their theory, if Wynne had made a conveyance between December 8 and March 2 to another party having notice of the deed of December 8, and before March 2 had recorded it, such conveyance would have been valid against the assignee. But yet such conveyance would not be valid against the grantees in the deed of December, because of the notice. On the theory of the opposite side, we would then have this absurd state of affairs—to wit, Enders & Co. would have a valid deed as against the subsequent purchaser with notice, but not valid as against the assignee ; while on the other hand the deed to the subsequent purchaser with notice would be valid against the assignee. When a doctrine leads to such absurd conclusions as these, we may rest very sure that the reasoning upon which it is based is vicious.

We therefore take it as a matter beyond respectable controversy, that the beneficiaries of an unrecorded deed have a lien as against the grantor and his representatives, which will be enforced in any court of equity.

We now proceed to discuss the character and quality of the estate which vests in the assignee by virtue of the bankrupt law, and especially to consider what are his rights, where a deed of trust was made before the passage of the bankrupt act, but not recorded until after such passage. The fourteenth section of the bankrupt act defines the rights of the assignee. He has "all rights in equity, choses in action, and all the bankrupt's rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, and all his rights of redeeming such property or

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estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had, if no assignment had been made." The rights of the assignee, and the quantum of his interest in the estate of the bankrupt are learnedly discussed in the leading case of *Winsor v. McLellan* (2 *Story*, 492). That was the case of an unrecorded mortgage of a vessel. The vessel was sold by the assignees, and the question was, whether the finds should be paid to the general creditors or to the mortgagees. Judge STORY, in his opinion, uses the following language: "Now the principle has been long established, that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand. The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt." In the same case, he says, when referring to the legal effect of the unrecorded mortgage: "In the view which I take of the matter, the bill of sale took effect as a mortgage, *at the time of the execution and delivery thereof to the trustees* on December 9, 1841." In *Parker v. Muggridge* (2 *Story* 334), Judge STORY uses the following strong language in reference to mere equitable liens, arising from contract, to wit: "The plaintiffs have an equitable lien and a superior title to the property over the assignee and the general creditors; and the assignee must take the property of the bankrupts for the general creditors, subject to this lien and superior title. The case of *Dale v. Smithwick* (2 *Vernon*, 151), is strongly in point, as to the nature and obligation of a contract of this sort to create an equitable lien or trust in property. In *Legard v. Hodges* (1 *Vesey Jr.* 477), Lord THUR-

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LOW said, that it was an universal maxim, that wherever persons agree concerning a particular subject, in a court of equity, as against the party himself, and any claiming under him, voluntarily, or with notice, it raises a trust. The cases of *ex parte* Copeland (3 *Deac. & Chitt.* 199), and *ex parte* Prescott (1 *Montag. & Ayt.* 316), and *ex parte* Fowler (2 *Montag. & Ayt.* 224), established that the same rule prevails in bankruptcy; and that the property will be followed and affected with the trust in the hands of the assignees, in the same manner and to the same extent, as it would be in the hands of the bankrupt. We all know that in bankruptcy, the assignee takes only such rights as the bankrupt himself had, and is subject to the like equities."

In *Fletcher v. Morey* (2 *Story*, 555), which was the case of an equitable lien against certain shipments, Judge STORY says: "Now, before proceeding to the points more directly in judgment, it is proper to remark, that it is a perfectly well settled principle in equity, that the assignee in bankruptcy takes the property and rights of the bankrupt in the same plight and condition, and with all the equities attached thereto, in the same manner as the bankrupt himself held them. I recollect at present but one exception to the doctrine, and that is in the case of fraud. The general rule was laid down by Lord HARDWICKE, in *Brown v. Heathcoate* (1 *Atk.* 160), and it has constantly been adhered to ever since. I need not cite the authorities at large. Many of them will be found referred to in a recent opinion, which I had occasion to deliver in the case of *Mitchell, assignee, v. Winslow*, at the last October term of the Circuit Court at Portland. This, then, being the established principle, the first question which arises in the case is, whether there is any equitable lien, or right, or claim, under the agreement, which ought to be enforced specifically in equity

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against the shipments made to and for Messrs Read & Co., or the proceeds thereof, so far as they can be distinctly traced in the hands of the assignee; and upon this point I entertain no doubt whatever. In equity, there is no difficulty in enforcing a lien or any other equitable claim, constituting a charge *in rem*, not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself, and his personal representatives, and against any persons claiming under him voluntarily, or with notice, and against assignees in bankruptcy, *who are treated as volunteers*; for every such agreement for a lien or charge *in rem*, constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts.

After enforcing this view by a citation of authorities, Judge STORY proceeds: "Assuming that the state courts have no power to enforce the lien or equitable claim or charge, arising under the present agreement, it is still capable of being specifically enforced in this court under its general equity jurisdiction, as well as under its particular jurisdiction conferred by the bankrupt acts. It is a valid agreement between the parties, and not prohibited by the laws of Massachusetts."

Further in the same case, he says: "But I take it to be clear, that not only liens, but mortgages of personal property are perfectly good and supportable between the parties, and against creditors, where there is no fraudulent intent, and the possession remains in the owner or mortgagor of the property, and is consistent with the deed and the arrangements made between parties. There is a strong line of authorities, that in cases of sales of personal property, conditional or absolute, the transfer or conveyance is not void, even though the possession remains with the vendor,

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if that possession is consistent with, and a part of the arrangement intended by the parties in the transfer or conveyance. So that the possession of the property by Messrs. Read & Co., in the present case, is not, in my judgment, a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of their creditors ; and therefore the agreement is binding and valid to give a lien or equitable charge upon the property in the hands of the assignee, fit to be enforced in the present suit.”

In *Mitchell v. Winslow* (2 *Story*, 630), Judge STORY says as follows: “The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors, and the mortgagee, claiming title under his mortgage ; and it arises upon a petition, partaking of the character of a summary proceeding in equity, and not in a suit at the common law, or governed by its principles. Now, it is most material to bear in mind, under this aspect of the case, that is a well-established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy ; and consequently, they are affected with all the equities which would affect the bankrupt himself, if he were asserting those rights and interests.” This was expressly laid down by Lord HARDWICKE in *Brown v. Heathcoat* (1 *Atkyns*, 160), where he said: “The ground that the court goes upon is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good” against such assignees.” The same doctrine was recognized by his lordship in *Jowson v. Moulson* (2 *Atk.*, 417). Sir WILLIAM GRANT, in *Mitford v. Mitford* (9 *Vesey*, 87), said :

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“I have always understood assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt’s) rights, precisely in the same plight and condition as he possessed them. Even where a complete title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shows they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed a distinction has been constantly taken between them and a particular assignee for a valuable consideration ; and the former are placed in the same class, as voluntary assignees and personal representatives.” The same doctrine was held by Lord THURLOW in *Worral v. Morlar*, reported in Mr. Cox’s note to *Pere Williams*, 459. It has ever since been firmly adhered to, and has been fully recognized at law, in cases of bankruptcy.

We might multiply authorities upon this point indefinitely. We, however, do not deem it necessary, after so distinguished an authority as Judge STORY has pronounced the doctrine to be “well established.” Now, if the assignee “can take only such rights and interests as the bankrupt himself had,” and which the bankrupt “himself could claim and assert at the time of his bankruptcy,” it becomes material specially to inquire what rights and interests Wynne himself could have claimed against the deed of trust creditors, at the time he was declared a bankrupt. We have already shown by the highest authority in the state, that the deed even when unrecorded was valid and effectual as between the parties, and that Wynne could assert nothing against the legal effect of its provisions. Judge STORY holds that even the equitable liens of third parties will be enforced by a bankrupt court under its equity powers, against an assignee. Surely, if this is so, a regular and formal assignment, recog-

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nized by the statute law, will be respected and enforced. The same eminent jurist, in one of the cases to which we have referred, declares that a bankrupt court would enforce liens, even if there was no specific provision in the act requiring it. Be that as it may, it is very certain that it is the well-established practice of the bankrupt courts to enforce all liens that exist by virtue of state laws. The bankrupt act adopts the liens that are known to the laws of the states respectively. If a lien is known to the law of Virginia, which is not recognized in New York, your Honor will enforce it. For that reason we have specially referred to the decisions of the court of appeals, to sustain the position that an unrecorded deed does establish a lien as between the parties to the instrument. If the deed of trust had never been recorded, it would be a lien as against the grantor and those claiming under him. Nay, more, it would be good as against the whole world, excepting creditors who had themselves acquired a lien, or purchasers without notice. No creditor either before or since the date of the recordation has acquired an adverse lien, nor has there been any purchase with or without notice. We submit, therefore, in every aspect of the case, that Enders, Paine & Williams can rightfully claim their lien, and that the assignee should be instructed to pay first out of the proceeds of sale now in his hands, the claims secured by the deed of trust.

We have not deemed it necessary to refer to the thirty-ninth section of the bankrupt act, as it relates to acts of bankruptcy, and only touches incidentally the matter of assignments and conveyances. Moreover in that portion which refers to conveyances and assignments, the provisions are identical with those of the thirty-fifth section and what we have said in relation to the latter, will apply with equal force to the former. Nor have we discussed whether Wynne was insolvent

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or contemplated bankruptcy, or whether the creditors knew that he was insolvent. We have thought that our case was sufficiently strong in its legal bearings for us to admit, for the sake of argument, anything that might be claimed in those respects by our adversaries.

Since the foregoing was written, we have been informed that your Honor has already decided that a vendor's lien will be respected and enforced in your court. We do not know the name of the case, but a brief mention of the facts will doubtless bring it to your Honor's recollection. In May, 1867, A sold land to B and executed a conveyance to him. B executed his promissory notes for the unpaid purchase money, and stipulated that he would secure them by a deed of trust. He, however, neglected or refused to do so, and in February, 1868, went into bankruptcy. Your Honor held in that case that the vendor had a lien for the unpaid purchase money, which you would respect and enforce. Judge STORY held to the same doctrine in *Fletcher v. Morey* (2 *Story*, 555). Such a case is surely not as strong as the present one in favor of the creditors. In that there was no deed at all, and of course no record.

We also call your Honor's attention to the well-considered opinion of Chief Justice AMES of Rhode Island, in the recent case of *Stone v. King* (7 *R. I.* 358), in which he held that a trust deed, which was given *without consideration even*, and which the grantor delivered to the trustee, who at the grantor's request communicated the fact of that delivery to the *cestui que* trust, and promised him to record it, could be enforced against the grantor, although the trustee afterwards refused to accept the trust, and returned the deed to the grantor, to be cancelled, and although the deed itself was destroyed by the grantor. The court in its opinion said: "The party who makes a voluntary

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deed, whether of real or personal estate, without reserving a power to alter or revoke it, has no right to disturb it; and as against himself, it is valid and binding, both in law and equity." If this is so as to voluntary conveyances, how much more is it so, in regard to conveyances for a valuable consideration, as in the present case? And how does the fanciful theory of a power of attorney, raised by the opposite side, comport with such principles as these? As to the doctrine that a *voluntary* settlement even, can not be revoked, without an express power of revocation reserved, see *Vellers v. Beaumont* (1 *Vernon*, 100); *Bale v. Newton* (1 *Id.* 404. Hare & Wallace, in their notes to the case of *Ellison v. Ellison* (1 *Leading Cases in Equity, marginal p.* 192), say: "When once an instrument creating a valid and complete trust is duly sealed and delivered, the obligation is complete; the detention of the instrument by the grantor does not render it inoperative." These annotators refer to many cases, where the deed was not only never recorded, but where the grantor kept possession of the instrument; yet as against the grantor and all parties claiming under him, the deeds were enforced. In the present case, the deed was actually delivered to the creditors.

Of course it will be borne in mind that the deed was *executed* prior to the passage of the bankrupt law, and that under the law as it then existed, would have been enforced by the law of Virginia. All such instruments have been since declared (if made after the passage of the bankrupt act by an insolvent) to be in fraud of the bankrupt law. It would be more proper phraseology to say *in violation* of the bankrupt law, because the act expressly makes such a preference by an insolvent, an act of bankruptcy. If not made by an insolvent, such preferences still hold. Even if made by an insolvent, they are not *avoided* unless the

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grantee or beneficiary had reason to believe the grantor insolvent. The true conclusion from all this is, that only conveyances made since the passage of the bankrupt act by an insolvent are in fraud or in violation of such act, and are not then avoided, unless the beneficiary has reason to know the insolvent condition of the grantor. A preference made since the passage of the act, may be an *act of bankruptcy*, without at the same time being void. We only mean to insist that when the judges in interpreting the bankrupt law, speak of conveyances or preferences in fraud of the law, they mean only to apply such phraseology to conveyances made since the bankrupt act was adopted. They never have meant to say that a conveyance or preference made before the act, even by an insolvent, was either fraud in fact, or fraud in law. So far from any actual or constructive fraud attaching to such preferences, they were, we believe, in every state in the union, certainly in Virginia, enforced not only against the grantor and those claiming under him, whether the preferences were recorded or not, but even against creditors and purchasers without notice, *unless* they acquired a lien or possession before record. See 13 *Grattan*, 615, that an unrecorded deed will prevail against general creditors, even after the death of the grantor.

CHASE, Ch. J.—The question in this case arises upon a petition of John Johns, Jr., assignee of Charles H. Wynne, an involuntary bankrupt, who asks for instructions as to the order of payment of claims against the bankrupt estate. Wynne was adjudicated a bankrupt on the petition of Wheelwright, Mudge & Co., filed in the district court of the United States for the district of Virginia on June 8, 1867. Enders, Paine & Williams claimed to be preferred in payment under a deed of trust dated August, 1866, which was never recorded; or if that claim be disallowed, then under a

deed of trust dated December 8, 1866, recorded March 2, 1867.

Haxall & Co. also insist on preference upon the ground that Wynne was tenant under them of the warehouse which he occupied, and that under the law of Virginia, they as landlords had a lien for the rent due at the date of the petition; to enforce which on June 10, 1867, they sued out a distress warrant for two thousand one hundred and twenty dollars, the amount of rent then due, and caused the same to be levied on the goods then on the premises, and subsequently, on July 18, 1867, sued out an attachment, which was levied the same day upon the same goods, for one thousand five hundred dollars, the amount of rent to become due on December 1, 1867. We will consider the claim to preference on payment advanced on behalf of Enders, Paine & Williams, and we must say at once that so far as this claim is founded on the deed of August, 1866, it can not be admitted. It is doubtless true that a mortgage or other conveyance made as security for a debt evinced by a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise.* But in this case it is the security itself which has been changed, and not the evidence of the debt. The deed of December 8, 1866, was executed, as it seems, in substitution for that of August, which thereupon ceased to have any validity or effect.

The only question now to be determined is, therefore, whether or not the deed of December created a lien upon the property described in it, which the assignee of the bankrupt must satisfy before applying any of its proceeds to the claims of the general creditors. And it is to be observed that the deed is not condemned by the thirty-fifth section of the bankrupt act, which

* Winsor v. McLellan, 2 Sto. 495.

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avoids all assignments and other modes of preference made or attempted by insolvents, or persons in contemplation of insolvency, within four months before the filing of the petition in bankruptcy, or in case the person to be benefited has notice of the intent within six months before such filing. The deed in question was not made within either limit of time. It need not, therefore, be here considered whether either period could begin to run till after the passage of the act. If the deed is to be treated as void or inoperative as against the assignee by operation of the act, it must be because of effect of that clause of the fourteenth section, which provides that "all the property conveyed by the bankrupt in fraud of his creditors," "shall in virtue of the adjudication of bankrupts and the appointment of the assignee be at once vested in such assignee." We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed,* subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but it is to be remembered that the assignee represents the rights of creditors as well as the right of the bankrupt, and that any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee.†

This is what the act means when it vests in the assignee, "all property conveyed in fraud of creditors." It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such conveyance or in-

* Bradshaw, assignee, v. Klein, 1 *Bkt. Reg.* 146.† In the matter of Richardson, 2 *Sto.* 521; Carr v. Hilton, 7 *Cow.* 280.

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cumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings.

And it may be remarked further that, except to this extent, the bankrupt act has no influence upon this case, so far as the deed of trust is concerned.

Much was said in argument concerning the effect of the record of this deed upon March 2, 1867; and it was strenuously urged that the deed was avoided by the effect of the act which purports to have been approved on that day. But we entirely concur with Mr. Justice STORY, in thinking that where the question is as to effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into.* And in this we think ourselves warranted also by the reasoning of the Supreme Court.†

Now, it is in proof that the deed of trust was recorded about 4 P. M. March 2, 1867; and it appears from the senate journal of the session during which the act was passed that the day denominated March 2, in the journal, and in the approval of the statute by the president, consisted in fact of Saturday, March 2, of Sunday the third, and of Monday the fourth, until noon; and it appears further that the bill which afterwards became the bankrupt law was not enrolled and delivered to the proper committee, to be presented to the president for his signature, until after the recess, which ended at 7.30, P. M. on Sunday, and was not reported to the senate as actually signed by the president until after 9.40, A. M. on Monday.‡ It can not be doubted, then, that the deed of trust was in fact re-

* *Gardner v. Collector*, 6 *Wall.* 511.† *Senate Journal*, 2d Sess. 39 Cong. 1866-67, pp. 432, 458; *Rev. Code*, 1860, p. 566, sec. 5.‡ See *Windsor v. Kendall*, 3 *Sto.* 515.

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corded nearly two days before the bankrupt bill became a law ; and we think ourselves not only warranted, on general principles, but bound by the constitution, to notice the fact thus appearing upon the public records. It may well be questioned, indeed, whether, if the act had been approved before the recording of the deed, the effect of the latter would have been altered. Nothing in the thirty-fifth section touches the deed ; and nothing in any other except the fourteenth. It may be, and we think it is, true that if the deed had remained unrecorded when the petition in bankruptcy was filed the title of the assignee would have prevailed against any claim under the deed, for the assignee represents the creditors, and the statute of Virginia expressly declares “any deed of trust void as to creditors,” until and except from the time it is duly admitted to record. It is not an unreasonable construction of the bankrupt act, as we think, which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt, discharged of liens or trusts which at the time of the petition are valid *inter partes* under the statute of the state in which they are claimed to exist. But we do not see how the mere enactment of the law could affect a deed previously executed.

It is not, however, necessary to consider these points here. The important question in the case is whether under the fourteenth section of the bankrupt act this deed must be regarded as inoperative against the assignee. The counsel for the assignee has argued with much earnestness that the deed can not be sustained without disregarding the implied effect of the first clause of the second general proviso of that section :

“That no mortgage of any vessel or of any other goods and chattels made as security for any debt or debts in good faith and for consideration, and otherwise valid and duly recorded pursuant to any statute of the

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United States, or of any state, shall be invalidated or affected hereby.”

The argument is that all mortgages not expressly saved from the operation of the act by this clause must be held invalid ; and, therefore, that all deeds of trust and other conveyances intended as security for debts, and not within the description of the mortgages expressly saved, must also be invalid.

But we can not adopt this reasoning. It would be going too far, we think, to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to the others. Much less does it say anything as to deeds of trust or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved to the general principles of jurisprudence. To hold otherwise would, we think, be to give to the act an *ex post facto* operation contrary the intent of Congress.

And it would be quite gratuitous so to hold ; for the rights of creditors as against all instruments not described in this clause are fully protected by that which stands next in the section and vests in the assignee, for their benefit, all the property conveyed by the bankrupt in fraud of his creditors.

The next question in this case, therefore, is whether the deed of trust by which the several liabilities of Enders, Paine & Williams, for Wynne, were secured, was made in fraud of the creditors of Wynne.

It has been argued that the deed of trust took effect as against creditors only on March 2, 1867, and that the recording of the deed on that day was itself an act of bankruptcy.

To maintain this proposition it is necessary to show that the recording of the deed was the act of Wynne. But clearly it was no act of his. The deed as against him was operative from its date. It was then that all his

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interest in the property described in it became vested by way of security in the trustee. It was then that he delivered the deed and parted with all control of it. If the beneficiaries were satisfied with the security afforded by the deed unrecorded, there was neither necessity nor obligation to record it. To record it was only necessary to make it a valid security against other creditors ; and it was not for Wynne, but for the creditors secured by the deed, to determine whether it should be recorded or not. The delivery of it for record was in no sense his act, but theirs. In no sense, therefore, can it be regarded as an act of bankruptcy.

But it has been argued that as against creditors, it must be regarded as a deed executed at the date of the record, and, therefore, as a deed creating a preference on that day, which was within four months of the filing of the petition. There is ingenuity and apparent force in this argument. But we think there are decisive answers to it. In the first place, the preference which the law condemns is a preference made within the limited time by the bankrupt, not a priority lawfully gained by creditors ; and we have just shown that the preference gained by the record was not a preference made by the bankrupt. And, in the second place, the law which makes deeds of trusts void "until and except from" the time of record, clearly makes them valid at and from that time. And it is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid.

It is hardly necessary to add that this must be especially true of a trust deed created and recorded before the approval of the bankrupt act.

Was there any actual fraud in giving or taking the security created by the deed of trust ? There has been no attempt to maintain this.

It has been said that Enders, Paine & Williams, on December 8, 1866, knew that Wynne was insolvent, but

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it is not denied that they had a right to obtain if they could preference in payment under the laws of Virginia. They could obtain it by direct transfer of property by deed of trust, by judgment and execution. Until after the passage of the bankrupt act, nothing but fraud in obtaining the preference could invalidate it in whatever mode obtained.

It is not necessary to insist on this in the case before us, for we do not think that the evidence establishes as matter of fact that at the date of the deed, or at the date of the record, Enders, Paine & Williams were aware of the actual insolvency of Wynne. They knew, indeed, that he was embarrassed in carrying on his printing and publishing business, but they seem to have fully believed that his property was more than sufficient to pay all his debts.

On the whole, we are of the opinion that the deed of trust must be supported as a valid deed, and that the creditors named in it are entitled to be paid out of the proceeds of the property embraced in it.

The remaining question to be considered is, whether at the time of the filing of the petition in bankruptcy Haxall & Co. had any lien for rent upon the property of the bankrupt.

This is the same property which was conveyed by the deed of trust, and the solution of the question just stated may be affected in some measure by the conclusion to which we have come in respect to the validity of lien created by that deed. And in considering the question now to be disposed of, we lay out of view the proceeding by distress warrant and also the proceeding by attachment. As we understand the bankrupt act, all the rights and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the

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date of filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested.*

Whether, therefore, the distress warrant or the attachment be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted.† If a lien for rent existed, it was a lien to be discharged by the assignee, and enforced in the United States court of bankruptcy.

If it did not exist, it could not be brought into existence by any proceeding whatever.

The real question is, Were the goods on the premises demised to the bankrupt subject to a lien for rent under the state law when the petition was filed, independently of any proceeding by distress or attachment?

Liens are various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section, of title 41, chapter 128, of the Revised Code of Virginia, adopted in 1860. It expressly prohibits any person having, by deed of trust,

* *Peck v. Tennessee*, 7 *How.* 612.† *Buckley v. Snouffer*, 1 *Md.* 149.

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mortgage, or otherwise, a lien upon goods of a tenant on demised premises from removing such goods without paying to the landlord the rent due, and securing the rent becoming due, not exceeding one year's rent, and it further requires any officer who may take such goods under legal process to pay out of the process the rent in arrear, and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due.

We can not doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation ; it is upon the statute book, and the lien it creates must be respected and enforced.

The validity of the deed of trust in this case seems to us clear, and it is not doubted by anyone that in the absence of the special circumstances supposed to affect it with invalidity, the lien of the creditors secured by it would be perfect. But these creditors, by no process whatever, could appropriate these goods to the satisfaction of their debts without paying or securing the year's rent ; and so of process under execution. The officer of the law, at his peril, must pay the rent out of the proceeds.

Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien under the execution, but the claim which by law is made superior to either as a charge upon the goods is no lien ?

We hold in this case that the creditors in the trust have a lien. How can we hold that the landlord, whose claim under the law is superior to theirs, has no lien ?

It seems to us, therefore, that Haxall & Co. had a valid lien for the arrears of rent due and for so much rent to become due under the lease as will make the whole amount secured equal to a year's rent. And we think that this lien is given by the statute independently of proceedings by distress warrant or attachment,

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which we regard as remedies superseded by the effect and operation of the bankrupt act.*

In this case we do not pass upon the claims of Haxall & Co. upon the assignee for rent beyond the year during which the lien for the rent is given. We are inclined to think that he was entitled to the occupancy during the unexpired term; and that for the rent becoming due during that period Haxall & Co. would be entitled to prove their claim against the bankrupts as general creditors.

The decree of the district court will be reversed, and a decree entered in conformity with the principles of this opinion.

* 1 *Bkt. Suppt.* xi.

Statement of the Case.

SEMPLE v. UNITED STATES.

May Term, 1868.

Inasmuch as the Confiscation Acts of August, 1861, and July, 1862, have been several times considered by the Supreme Court in reported cases, and no question has ever been made by counsel or court of the constitutionality of those statutes, it is a fair conclusion that neither the bar nor bench doubted their constitutionality.

This court will hold, therefore, for the present, those acts to be constitutional, but will be gratified to have the question submitted to the Supreme Court, and adjudged upon direct argument and consideration.

Proceedings for condemnation of lands under these statutes, may be according to forms used in Admiralty, but they must conform to the course of the common law in respect to the trial of issues of fact and exceptions to evidence, and can only be reviewed after final judgment or decree on writ of error, that writ being the process by which common-law proceedings are reviewed—appeal being the appropriate method in causes of admiralty and maritime jurisdiction.

In this cause the proceeding has properly been by writ of error.

But their being no appearance in the court below, there could be no issue of fact, nor direction for trial by jury, and therefore judgment was properly entered by default.

If it appeared by the record that an issue had been made and tried by the court without a jury, and without submission by the parties, the judgment would have been reversed.

Statement of the Case.

Semple owned property in Elizabeth City county, Virginia, almost under the guns of Fortress Monroe, and adhering to Virginia during the civil war, necessarily followed her flag, and remained within her military lines.

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While so absent from his home, it was seized under the process of the District Court of the United States by virtue of the confiscation acts of Congress, and a due notice stuck up at the court-house door for him to appear and defend his property.

It being the decision of that court that no person adhering to "the rebellion," should appear there in person or by attorney to defend his property, and Semple being likewise within military lines where it was illegal and impossible for him to hear what was transpiring in and about the District Court of the United States for Virginia, he never did appear and defend in the proceeding.

Whereupon evidence was heard and a decree of confiscation rendered against him by default, and the property sold under a writ of *venditioni exponas*.

The record was now brought into this court on writ of error, for the purpose of obtaining a decision here that the proceedings below having been in admiralty were void, and therefore the sale of Semple's property would fall with the decree on which it rested.

CHASE, Ch. J.—This case comes before us upon a writ of error to the District Court for the District of Virginia.

The proceedings in that court were by seizure and libel of information for the condemnation, under the act of July 7, 1862, of certain real estate of the plaintiff in error, situated in Elizabeth City county, within the District of Virginia.

The seizure and libel were followed by an order fixing a short day for trial, and directing the issue of monition and publication of notice according to the ordinary course of admiralty.

There was no appearance, and the decree of confiscation or forfeiture after examination of witnesses, was

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made upon default, and the property was sold under a writ of *venditioni exponas*.

Three points were made in argument for the plaintiff in error.

The first is that the act under which the proceedings for condemnation were had, is unconstitutional. Several cases arising under this act and that of August, 1861, of like tenor, have been considered by the Supreme Court (Union Insurance Company v. The United States, 6 Wall, 763, and other cases in same volume).

In neither of these cases was this point made, either by counsel or by the court; and it is a fair conclusion that neither at the bar nor upon the bench, was the constitutionality of the act doubted.

We, at least, unless clearly satisfied that the act is unconstitutional, and satisfied also that the point passed without observation in the Supreme Court, are bound here by the action of that court.

We shall hold, therefore, for the present, that the act is warranted by the constitution; but shall be gratified if the question is again submitted to the Supreme Court, and adjudged upon direct argument and consideration.

The other point made for the plaintiff in error is, that the suit in the District Court was in admiralty; whereas, being for condemnation of a seizure of land, the remedy should have been sought in the common-law side of the court.

But in the Union Insurance Company v. The United States, it was held that a proceeding for condemnation might well be according to forms used in admiralty, although it must be conformed to the course of the common law, in respect to the trial of issues of fact and exceptions to evidence; and, regularly, could only be reviewed after final judgment or decree upon writ of error.

In that case there had been an appearance and

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claim, but no trial by jury and no exceptions to evidence ; and the cause was brought into the Supreme Court by appeal.

The court took jurisdiction of the cause upon the appeal only, for the purpose of reversing the decree as irregular, and remanding the cause for further proceedings. In this case the cause is brought before us by writ of error, not by appeal ; and this mode of invoking the appellate jurisdiction is peculiar to civil actions as distinguished from causes of admiralty and maritime jurisdiction. It is evident, therefore, that the plaintiff in error did not regard the proceedings below as a cause in admiralty ; and he was right, for though in the form of admiralty, it was, in substance, a proceeding at common law. If it appeared from the record that an issue had been made and tried by the court without a jury, and without submission by the parties, it would be our duty to reverse the judgment or decree in conformity with the principles settled in the *Union Insurance Company v. The United States* ; but nothing of this sort appears. The cause was suffered to go by default, and there can be no direction of trial by jury where no issue is made and no such trial demanded. On the contrary, it is the constant practice to render judgment of forfeiture in such cases by default, without the intervention of a jury (*Conkling's Pract.* 568). We see, therefore, no error in the judgment or decree of the District Court, and it must be affirmed.

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DISTRICT OF WEST VIRGINIA.

CHARGE TO THE GRAND JURY AT PARKERSBURG,
AUGUST, 1868.

Gentlemen of the Grand Jury: You have been selected among your fellow-citizens for your intelligence, your impartiality, and your integrity, to inquire concerning offenses against the United States within the District of West Virginia. Your general duties are sufficiently defined by your oath, which binds you under the most solemn obligations to present no one from envy, hatred, or ill-will, and to leave no one unrepresented from fear, favor, and affection. The same oath binds you to diligent inquiry as well as true presentment.

You will not acquit yourselves of these obligations by slight or careless investigation. You must not be satisfied by acting upon such cases only as may be brought before you by the District Attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. You may, and you should, summon before you officers of the government, and others whom you may have reason to believe possess information proper for your action, and examine them fully. Officers connected with the collection of internal revenue—collectors and assessors and their subordinates—may with special propriety be thus examined.

In respect to the mode and extent of your inquiries, your own good sense will be your best guide. The District Attorney will always be ready to aid you with information on matters of law; and the Court also will

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take pleasure in responding to any inquiries you may see fit to make.

There are three subjects, and, so far as we are at present advised, only three subjects, to which it is necessary to direct your particular attention.

The first of these is the faithful execution of the internal revenue laws. The war in which the nation has been recently engaged for the preservation of the National Union and Government endangered by rebellion, made the contracting of a large debt inevitable. This debt is the price of our national existence, and binds irrevocably the good faith of the people. Its inviolable obligation has been recognized by a solemn act of the nation in adopting the fourteenth amendment of the Constitution of the United States, which declares that "the validity of the public debt of the United States, authorized by law, including debts incurred for the payment of bounties for services in suppressing insurrection or rebellion shall not be questioned." There are differences of opinion as to the mode of payment required by the contracts of the American people made through their government, but nobody questions openly, if anybody questions at all, that the debt contracted must be paid, and paid in perfect good faith. The law of the amendment that the validity of the national debt shall not be questioned, was already written upon the hearts of the people before they made it part of the Constitution. To provide for the reduction and final payment of this debt and for the annual expenses of the government, taxes are necessarily imposed. In other words, the equal proportion to be contributed by each citizen is ascertained by law. He who withholds his just proportion deprives the rest of the people of exactly the amount withheld. His fraud operates as theft.

The sum total necessary to meet the obligations of the nation must be raised. Fraud upon the revenue

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does not reduce that sum, it merely shifts the burdens evaded by the fraudulent upon others who pay their full proportion besides. All honest men, therefore, have a common cause against the dishonest.

You, gentlemen, represent the honest men, and it is your duty to see that no defrauder of the revenue who can be brought to justice escapes merited punishment. The higher in office and the higher in social position the delinquent may be, the more unremitting and searching should be your diligence in inquiry and presentment.

Some of the observations just made might be properly enough repeated upon the next topic to which I must invite your attention. I refer to counterfeiting. It is to be regretted that the currency of the country now consist wholly, or almost wholly, of paper ; but it is not the less important on that account that the people should be protected as far as possible against counterfeiting. Whatever the currency of the country may be, payments must be made in it, and exchanges effected through it. It is practically the common measure of values. Whoever imposes a counterfeit dollar on the public, robs successively all who take it in payment. Counterfeiting is continuous robbery, and it robs chiefly those who are least able to bear the loss. Occasionally men are defrauded by counterfeit money in large transactions, but the principal sufferers are laboring men, whom it is the peculiar duty of government to protect from wrong.

You will be vigilant, gentlemen, in your investigations concerning this class of crimes.

What remains to be said concerns offenses against the Post-office laws. Under our benignant system of government, the means of cheap and frequent intercourse between the most distant parts of the republic are provided ; relatives and friends separated by the breadth of the continent correspond freely with each

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other. Correspondence is nearly as cheap as talk. And not only do the mails convey messages of affection, science, and business, but they are also the agents of immense pecuniary transactions, by remittances of bills of exchange and small government money orders. You see at once how important it is that the laws which regulate this vast interchange should be faithfully executed, and we are confident that nothing more is needed to insure your best endeavors to detect and bring to justice all those whose crimes and offenses deprive the people of the great benefits which those laws are intended to secure.

There seems to be no necessity at this time for further observations from the Court. You will retire to your room, gentlemen, carrying with you, we doubt not, in your retirement, a profound sense of the serious obligations you have taken upon yourselves, to your country and to your God.

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DISTRICT OF VIRGINIA.

November Term, 1868.

SHOEMAKER v. FRENCH.

An application for an injunction having been made in the United States Circuit Court, and the defendant served with notice thereof, all jurisdiction of the state courts in regard to matters cognate thereto is ousted, or must be exercised in subordination to the jurisdiction of the Federal Court.

Statement of the Case.

Shoemaker filed a bill in this court against French for an injunction to prevent his acting or claiming to act as President at the Alexandria and Washington Railroad Company, and the court passed an order directing French to be served with notice of motion for injunction.

After this order was passed, French filed his bill in the state court at Alexandria, praying an injunction against Shoemaker for matters cognate to the bill in this court.

CHASE, Ch. J.—The jurisdiction of this court as to these matters attached when Shoemaker's bill was filed here, and the order passed by this court. Therefore the jurisdiction of the state court was ousted, or must be exercised in subordination to the jurisdiction of this court.

The injunction is granted according to the prayer of the bill.

Statement of the Case.

DISTRICT OF MARYLAND.

JACKSON v. THE NORTHERN CENTRAL RAILWAY.

No British subject resident in Great Britain is liable to the income tax provided for by sec. 122 of the internal revenue act of June 30, 1864.

Neither the general tax law of Pennsylvania, Brightly's Dig., ed. 1858, nor the act of assembly of April 30, 1864, contemplate taxing the interest coupons of railroad bonds.

Semble: There is nothing in the statutes of Pennsylvania which would authorize the assumption that the legislature of Pennsylvania ever intended to tax bonds, or interest on bonds held by citizens of other states, or the subjects of foreign powers.

Also *semble*: That a tax on the interest accruing on the loans or stocks issued by corporations, and guaranteed by the state, may be properly collected by deduction and retention by the officers of the corporation.

Statement of the Case.

The laws of the United States and of the state of Pennsylvania directing the collection of a tax on incomes, levied the tax, and then when the income was derived in whole or in part from dividends from stock or interest on bonds of incorporated companies, directed such companies to retain the amount of such tax and pay it to the United States and the state of Pennsylvania respectively, thus creating such corporations collectors of taxes to that extent.

Under these laws, the Northern Central Railway Company—a corporation created by the laws of Pennsylvania and Maryland, and owning and operating a railroad from Harrisburg, in the former, to Baltimore, in the latter state—retained the amount of these

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two taxes from all coupons of all bonds issued by it and paid to the bondholders, the amount due on these coupons, less the said taxes. No distinction was made as to where the bondholder resided, nor of what country he was citizen or subject.

All alike were thus subjected to the taxing power of the United States and of the state of Pennsylvania, and all alike thus forced to contribute to the support of these two governments.

Under these circumstances, Jackson, the plaintiff in this suit, a British subject resident in Ireland, declined to receive the money for his coupons, less these taxes, and claimed that the company should pay him the whole amount due on the face of them. His demand being refused, he brought this suit in this court.

CHASE, Ch. J.—The court has considered the questions argued yesterday upon the prayer of the counsel for the defendant in the case of John G. Jackson v. The Northern Central Railway Company, and I will now state our conclusions.

It is admitted that Jackson is a British subject resident in Ireland. He has brought suit against the Northern Central Railway Company, a corporation organized under the laws of Maryland and Pennsylvania, to recover the sum due on certain interest coupons, amounting to two thousand six hundred and fifty dollars, now due on the bonds of the company and belonging to him.

The company does not deny the plaintiff's title to the coupons or its own obligation to pay them, but claims that it is bound to deduct and withhold from him certain percentage to be paid into the treasury of the United States and Pennsylvania respectively, and that he can recover, therefore, only the amount of the coupons less these deductions. The counsel for the

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company prays the court to so instruct the jury. The plaintiff denies the right of the defendant to have these deductions made.

The deductions claimed are two: five per cent. on the amount of the coupons for the United States, and three mills on each dollar of the principal of the bonds for Pennsylvania.

The internal revenue act of Congress, approved June 30, 1864, section 116, 13 *Stat.* 281, imposes on the income of every person residing in the United States, and of every citizen of the United States residing abroad, whether derived from interests, dividends, or other sources, a duty of five per cent. on the excess over six hundred dollars and not exceeding five thousand dollars; of seven and a half per cent. on the excess over five thousand and not exceeding ten thousand dollars; and ten per cent. on the excess over ten thousand dollars.

In the next section it is provided that in ascertaining the income of any person liable to an income tax, the amount received as dividends or interest from institutions whose officers, as required by law, withhold a percentage of their dividends on shares or interest on bonds, and pay the same over to an authorized officer of the government, as required by section 122, shall be included, and the amount so withheld shall be deducted from the tax assessed.

This section, it is clear, imposes no income tax whether derived from interest on bonds or from dividends on shares, or from any other source, except on citizens of or residents in the United States. It imposes, therefore, no income tax on the plaintiff, Jackson, who is neither such citizen nor resident.

It is clear also that Congress regarded the duty on dividends directed to be withheld by the officers of the companies paying them, and to be paid over by them to the proper officers of the government, as an income

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tax to be paid only by citizens or residents of the United States.

The fact that Congress regarded the duty on dividends in this light, materially aids in the construction of the 122nd section of the internal revenue act, which is mainly relied upon by the defendant. This section subjects all railroad, canal, turnpike, canal navigation or slack water companies, to a duty of five per cent. on all interests and dividends derived from their bonds or shares, and authorizes them to withhold that amount from the bondholders or shareholders, and makes payment to the government a discharge to that extent from payment to them. The language is general, and if the section stood alone an argument of some force might be drawn from it, that Congress intended to impose an income tax on interest and dividends from such bonds and shares, without reference to the residence or citizenship of the holders. But the section does not stand alone. It must be considered in connection with other parts of the act; and the 116th section, as we have already observed, regards dividends and interests, subject to deduction by the officers of the companies paying them, as an income not taxable except when payable to citizens or residents.

It is impossible to ascribe to Congress the intention of taxing citizens or subjects of foreign states in this indirect way. Sound principles of construction require us to regard this section as simply providing for the cheap and efficient collection of the tax on incomes derived from the bonds and shares of the companies described, and not at all as touching the number or classes of income tax payers. The interest and dividends on which the duty is thus collected must be regarded as the same interest and dividends on which a duty is imposed by the 116th section, and as subject to duty only when held by citizens or residents of the United States.

The defendant's prayer for instructions, therefore,

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must be denied so far as it asserts a right on the part of the railroad company to deduct five per cent. from the amount of interest coupons held by plaintiff for the purpose of paying the same into the treasury of the United States.

The defendant also claims by his prayer a right to deduct from amount of the coupons sued on three mills per dollar on the principal of each bond to which the coupons are annexed. Three mills per dollar on each bond is three dollars on each thousand dollar bond. The semi-annual interest due on each thousand dollar bond is thirty dollars. The claim, therefore, is to deduct three dollars from each thirty dollars of interest; or in other words ten per cent. of the whole amount of the interest coupons, to be paid into the treasury of Pennsylvania.

For support of this claim we have been referred to the 98th and 101st sections of the general tax law of Pennsylvania, as printed in Brightly's Digest, edition of 1858, and to the third section of a statute of the same state imposing additional taxes, approved April 30, 1864. We have had time for very little further search, and are not aware of any other statute which can be regarded as supporting the claim. We shall consider it, therefore, almost exclusively with reference to the provisions to which we have been referred.

The first of these, in section 98, page 787, of Brightly, is a mere enumeration of the subjects of taxation in Pennsylvania. Among these are included "mortgages," "money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment," and also "all public loans or stocks whatsoever, except those issued by the commonwealth." It is not easy to imagine that interest coupons are intended by either of these descriptions. They are certainly not "mortgages," nor "public loans," nor "stocks;" if they come under either description, it must be under that of

Opinion by CHASE, Ch. J.

“money owing by solvent debtors,” and that they do not come under this is almost conclusively proved by its remaining words, namely, “by promissory note, penal or single bill, bond or judgment.” These words irresistibly suggest the inference that it was the principal of the “money owing,” and not the interest payable and paid from time to time, which was regarded as the subject of taxation.

And this inference is strengthened by the language of the second provision cited from the 101st section of the same law. The section specifies certain property to be assessed at certain rates for state purposes, and then adds the clause for the defendant, namely: “And on all other property taxable for state purposes three mills on every dollar of the value thereof.” We think there is no reference here to the taxation of interest. Interest taxed as income is not aptly described as property taxed on the value thereof. Nor is it likely that so trifling a tax as three mills on the dollar, three tenths of one per cent. less than eight dollars on the amount of the interest coupons sued on, would be imposed as tax on interest considered as income.

The third provision cited for the defendant is from the third section of the act of 1864. It provides that the officers of incorporated companies paying interest on which, by the laws of Pennsylvania, a tax is imposed, shall retain the amount of the tax and pay it over to the state treasurer.

We do not regard the two first provisions, cited by the defendant’s counsel, as imposing a tax on the interest on the bonds issued by any company, and, therefore, are obliged to regard the citation from the act of 1864 as inapplicable. If no tax is imposed by the laws of Pennsylvania, on the interest due from a company, none can be retained. It was doubtless intended by the legislature that money due from solvent debtors and other property, should be entered upon the general list

Opinion by CHASE, Ch. J.

of property for taxation, and that the amount of the tax assessed should be ascertained and collected in the usual manner without the intervention or agency of the debtors.

There is indeed a statutory provision to which the act of 1864 is applicable, and to which doubtless it was intended to apply. The 105th section of the general tax law, found on page 780 of *Brightly*, imposes a tax on the interest accruing on the loans or stocks issued by corporations and guaranteed by the state ; and this is a tax which might be properly enough collected by deduction and retention by the officers of the corporation ; but it does not apply to the bonds of the defendant, for it is not claimed that they are guaranteed by the state.

It follows that we must overrule the prayer of the defendant. It is proper to add that we have seen nothing in the statutes of Pennsylvania which warrants the supposition that its legislature ever intended to tax bonds or the interest on bonds held by citizens of other states or the subjects of foreign powers.

These views relieve us from the necessity of considering the grave, if not difficult question, whether any one state can tax the interest on the whole bonds of a railroad company whose road lies in several states, and whose franchises are conferred by the acts of several states, and whose means to pay interest must be derived from the operation of its road in every state where it lies. It is certain that if one state can impose such a tax, and enforce its collection by deduction from interest, every other state in which the road is operated may do the same, and so the whole road may be taxed in every state where a part of it lies. We leave this question to be decided when it may become necessary.

The prayer of the defendant is overruled, and the following instruction is given to the jury :

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“If the jury shall find from the evidence that at the commencement of this suit, the plaintiff was the lawful holder of the coupons representing interest due on bonds of the defendant, held by him, and that the plaintiff when he purchased such bonds was a British subject and resident in Ireland, and that he now resides there, the plaintiff is entitled to receive the amount of such coupons without deduction.”

The jury then rendered a verdict for the plaintiff for two thousand six hundred and fifty dollars, the amount claimed, he waiving his right of interest.

Statement of the Case.

DISTRICT OF VIRGINIA.

IN RE MITTELDORFER & Co., BANKRUPTS.

May Term, 1869.

Assignees in bankruptcy of a firm sent back to the register for additional proof of a certain claim of M., proved by the oath of a member of the firm as trustee of the claimant. On application to the District Judge by the counsel of the trustee it was ordered that dividend on the claim be paid.

The assignee had no notice of the application, and petitioned the Circuit Court to review the case, and to reverse the said order. Held,

The District Court has power upon petition of the contesting creditor, to reverse the decision of an assignee rejecting his claim, but the mode of proceeding must be regular, and the assignee should have opportunity to answer and contest the claim; order of the District Court reversed.

Sembla : That a member of a bankrupt firm can not represent claims against the estate.

Rutherglen, for the assignees.

Chandler, for the respondent.

The facts are so fully set forth in the petition, that it is inserted as a statement of the case.

Unto the Honorable SALMON P. CHASE, Chief Justice of the United States of America, &c.

The petition of Andrew Rutherglen, of the city of Richmond, one of the assignees of Mitteldorfer & Co., bankrupts, respectfully sheweth :

That on this date (March 30, 1869), his Honor Judge

Statement of the Case.

UNDERWOOD, was pleased to issue an order in the following terms :

United States District Court, }
District of Virginia, Clerk's Office, }
Alexandria, Virginia, March 30, 1869. }

In the matter of
MOSES MITTELDORFER, } In bankruptcy.
Bankrupt. }

On February 20, 1869, an order having been made in this cause directing the payment by Messrs. Rutherglen and Kent, the assignees, to Moses Mitteldorfer, the trustee to Mrs. Marcus, the wife of Jonas Marcus, of the dividend proven by her said trustee to which she is entitled, in common with the other creditors, unless within thirty days the said assignees should show cause why such dividend should not be paid, and no steps having been taken by said assignees in this wise, that order is now made final, and the assignees are hereby directed to pay the said dividend at once to the said trustee, Moses Mitteldorfer.

JNO. C. UNDERWOOD,
Dist. Judge.

A true copy. Teste.

Ed. J. Underwood, Dist. Clerk.

That your petitioner feels himself aggrieved by said order, and, therefore, prays that it be reviewed by your Honor, and that upon this review your Honor may be pleased to reverse the same, or to alter, vary, or do otherwise in the premises as the circumstances set forth in the following statement of facts and reasons may warrant :

Statement of Facts.

1. Of this date (September 24, 1867), the firm of Mitteldorfer & Co. (the partners whereof being Moses Mitteldorfer, Charles Mitteldorfer, and Jonas Marcus) was in a state of hopeless insolvency, and notwithstanding their perfect knowledge of this fact, they de-

Statement of the Case.

terminated to "struggle on" in business, evidently for the purpose of getting certain properties of Moses Mitteldorfer's disposed of in fraud of the firm's creditors, and said properties were so sold and to the persons as follows: First, September 26, 1867, a lot and house to Julius Straus, a son-in-law of the said Moses Mitteldorfer, for two thousand six hundred dollars. Second, November 25, 1867, a lot and house to David Mitteldorfer, a son-in-law of Moses, for two thousand dollars. Third, lots and houses on Navy Hill and Third street, to L. Straus, for twelve thousand five hundred dollars.

2. Of this date (January 13, 1868), after further attempts for a period of four months by Mitteldorfer & Co. to effect a compromise with their creditors, Messrs. Lathrop, Ludington & Co. of New York, to whom the bankrupts were indebted in the sum of ten thousand four hundred and seventy-three dollars and five cents, filed a petition in the bankruptcy court of the city of Richmond, praying the court to adjudicate the said Mitteldorfer & Co. bankrupts.

3. Of this date (January 23, 1868), the said firm was adjudged bankrupts by his Honor, Judge UNDERWOOD, accordingly.

4. Of this date (January 25, 1868), the case was referred to Mr. Register Bond for further action.

5. Of this date (February 26, 1868), the usual warrant to the marshal as messenger, was issued by Mr. Register Bond; said warrant was returned executed on March 2, 1868.

6. Of this date (March 20, 1868), Andrew Rutherglen and Horace L. Kent, were appointed assignees in said bankruptcy, and on the following day notified their acceptance of said appointment.

7. Of this date (March 24, 1868), the assignees having obtained possession of the premises, stock in trade, and books and papers of the bankrupts in so far as

Statement of the Case.

surrendered by them, your petitioner made up an inventory of said books and papers accordingly.

8. That in the course of his investigations of said books and papers, your petitioner found that several books, indispensable to the assignees in their examination of the bankrupts' affairs, had been concealed or destroyed, and although repeatedly applied for, and threats made of enforcing the 44th section of the act against the bankrupts, no surrender of said books has been made.

9. That your petitioner of this date (September 28, 1868), proceeded to examine the proofs and claims of creditors filed with the register, and in consequence of the absence of ledger A (one of the concealed or destroyed books), your petitioner had to pass over claims or pretended claims, chiefly among Moses Mitteldorfer's own family and personal friends, amounting to twenty-five thousand two hundred and seventy-five dollars and one cent, until the production of the said ledger A.

10. That among these claims (in suspense) is the one made by the bankrupt, Moses Mitteldorfer, as trustee for his daughter, the wife of his partner, Jonas Marcus, for six thousand eight hundred and forty dollars. This claim your petitioner is satisfied is fraudulent, and will on the production of ledger A prove it to be so.

11. That of this date (February 18, 1869), an order in the following terms was served upon your petitioner (but no copy of such order was ever served on his colleague, Mr. H. L. Kent).

"The within named assignees are hereby ordered to comply with the prayer of the within petitioner, or show cause for their failure to do so, forthwith, before the District Judge.

[Signed]

"JNO. C. UNDERWOOD,

"Feb. 18, 1869."

"Dist. Judge.

Statement of the Case.

No copy of the "within petition" was ever exhibited to, or served either upon your petitioner or his colleague, Mr. Kent. It is said to have been at the instance of Mrs. Rosalie Marcus, but for some cause it has never been filed in the clerk's office.

12. That your petitioner at once obtempered said order by appearing before the District Judge, and averred and plead that the claim was one that could not be sustained until the production of the concealed or destroyed ledger A; that his Honor fixed the following Saturday, February 20, 1869, to hear parties thereon.

13. That on Februrry 20, 1869, as fixed, your petitioner attended the District Judge in chambers, along with counsel for the claimant; parties having been fully heard, his Honor indicated an opinion that he would issue an order requiring the assignees, within thirty days thereafter, to adduce their evidence why the claim should not be sustained.

14. That of this date (February 20, 1869), being the last day of term, and his Honor much pressed with business of the court, requested your petitioner to draw such an order as would meet his views of the case; this your petitioner had done, but on presenting it for his Honor's signature, he said he would require to make an alteration which, when made, he would leave with Mr. Hunter in the clerk's office. The same evening your petitioner called at the clerk's office for the order, but found it had not been left; he proceeded to the Spotswood and saw the judge, who stated that he had not been able to overtake a number of little things, this order among them, but in a few days it would be sent from Alexandria. Your petitioner repeatedly applied at the clerk's office for the said order, but the invariable reply was, that none such had ever been received.

On March 22, petitioner saw the judge, personally,

Statement of the Case.

at Alexandria on the subject, who promised that it would be transmitted to Richmond by the middle of that week.

15. That your petitioner (of this date April 9, 1869) received with no little surprise the imperative order, by Judge UNDERWOOD, dated March 30, 1869, declaring the order of February 20, 1869, final, an order which your petitioner had troubled himself so much to obtain, and which neither of the assignees in this bankruptcy ever saw or had served upon them, and which required them forthwith to pay to the bankrupt, Moses Mitteldorfer, as trustee for his daughter, Mrs. Marcus, the sum of one thousand three hundred and sixty-eight dollars, of the money of Mitteldorfer & Co., creditors, without any proof whatever in support of the claim except the oath of the said Moses Mitteldorfer, bankrupt, who was incompetent to make such proof of debt even had proof of it existed.

16. From the preceding statement of facts and following reasons, your petitioner respectively submits that the order by Judge UNDERWOOD, of March 30, 1869, be recalled, and the assignees allowed a proof of their averments in the premises. Reasons:

1. Because the petitioner and Mr. H. L. Kent are assignees of Mitteldorfer & Co. as a company, and not of Moses Mitteldorfer in his individual capacity.

2. Because the funds in the possession of the said assignees are the moneys recovered from the assets of Mitteldorfer & Co., and can only be applied in payment of the company's debts.

3. Because the pretended claim of the bankrupt Moses Mitteldorfer, as trustee for Mrs. Rosalie Marcus is fraudulent, and his oath, which has been sustained by the District Court as the ground for issuing the order of March 30, 1869, is not only no proof of debt of itself, but it is illegal and incompetent in respect of the said Moses Mitteldorfer's bankruptcy.

Statement of the Case.

4. Because, were the claim of Mrs. Marcus a just and valid claim against Mitteldorfer & Co., the proof in her favor could only be made by the assignees in bankruptcy of Moses Mitteldorfer, unless the court had made a new appointment of trustee to Mrs. Rosalie Marcus, which in this case it has not done.

5. Because in the absence of ledger A, fraudulently concealed or destroyed by the bankrupts, Moses Mitteldorfer, Charles Mitteldorfer, and Jonas Marcus, the individual partners thereof, have rendered themselves amenable to the penal section of the bankrupt act, which provides that to "part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove or cause to be removed, the same or any part thereof out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of the United States, shall be punished by imprisonment with or without hard labor, for a term not exceeding three years."

6. Because the bankrupts have removed, concealed, or destroyed ledger A, for the purpose of hindering, impeding, and delaying your petitioner in his investigations into the affairs of their said firm, and more especially as regards the pretended Marcus transaction. Your petitioner avers, and will on the production of the said ledger A, prove, that for their purpose of carrying through this fraudulent claim the books of the firm of Mitteldorfer & Co. have been falsified.

7. Because the proceedings in the District Court in this case are irregular and inapt, in respect that the order of February 18, 1869, was issued on the mere petition (it is said) of Mrs. Rosalie Marcus, coupled

Statement of the Case.

with certain ex parte statements of her counsel, but who has proved no debt against Mitteldorfer & Co., and said petition is unknown in the proceedings.

8. Because, that on such an application being made, your petitioner avers that the duty of the judge was to order service of said petition upon the assignees, requiring them within a specified time to file answers thereto, but instead of order and form, a series of irregularities go on, ending in the issuing of orders which are not obeyed, because they never reach the parties on whom by order of the court they ought to be served. Assignees are bound to protect creditors at all hazards, and in the present case they would have been derelict in their duty, had they not resisted the payment to an undischarged bankrupt of this sum of one thousand three hundred and sixty-eight dollars of the creditors' money without one tittle of evidence that the firm was in any way responsible for such claim beyond the oath of Moses Mitteldorfer, wholly unsupported by any evidence whatever, and which oath clearly proves his own malfeasance as trustee to his daughter, and for which he is alone responsible.

In respect to the foregoing facts and reasons, your petitioner respectfully craves that your Honor will be pleased to recall the entire proceedings, and of new, order the petition of Mrs. Rosalie Marcus to be served upon the assignees of Mitteldorfer & Co., and ordain them within a reasonable time to file their answers thereto, remitting the case to Mr. Register Bond to take the evidence of parties and report, or do otherwise in the premises as to your Honor may seem proper.

In respect whereof,

ANDREW RUTHERGLEN,

For Petitioner.

Opinion by CHASE, Ch. J.

Rutherglen, for the petitioner.

L. H. Chandler, for respondent.

CHASE, Ch. J. — It appears in this case, that Moses Mitteldorfer, one of the bankrupts, filed with the register a claim in behalf of Rosalie Marcus for six thousand eight hundred and forty dollars. This claim proved by the oath of Mitteldorfer, was referred together with the others against the estate of the bankrupts by Register Bond, to the assignees, Andrew Rutherglen and Horace L. Kent. Upon examination, some of the claims were allowed, and others rejected. The claim of Mitteldorfer, in behalf of Mrs. Marcus, was among the rejected claims, and with the others, was returned to the register for further proof if any could be made.

In this state of facts, a petition was presented to the District Judge, for an order directing the assignees to pay a dividend on this claim to Mitteldorfer as trustee, equivalent to that paid on the admitted claims. This dividend was 20 per cent. on six thousand eight hundred and forty dollars, and amounted to one thousand three hundred and sixty-eight dollars. The first order to this effect was made on February 20, 1869. This order not having been complied with by the assignees, a peremptory order was made on March 30, 1869, reciting the original order, and requiring a compliance with it.

The object of this petition is to obtain a revision and reversal of these orders. The act, in the 22nd and 23rd sections, requires that the proof of claims be made before the register, or commissioner, and transmitted to the assignee, who is to examine the same and compare it with books and accounts of the bankrupts, and register the names of the creditors who have proved their claims.

Opinion by CHASE, Ch. J.

This seems to have been done in the bankruptcy under consideration. The claim of Mitteldorfer as trustee for Mrs. Marcus, was sworn to before the register, and transmitted to the assignees, and upon examination rejected by them and returned to the register to be held for further proof. No further proof in this claim seems to have been offered, but Mitteldorfer presented his petition directly to the District Judge for the orders referred to.

It does not appear that due notice of this petition was given to the assignees, or that opportunity was given them to contest the claim.

It can not be doubted that the District Court has power, upon the petition of any creditor whose debt has been rejected, to revise the decision of the assignee rejecting. But the mode of proceeding in the present case seems to me to have been irregular. The assignees should have an opportunity to answer the petition and contest the claim, and if upon consideration the court had determined that it should be allowed, an order should have been made requiring the assignees to place it upon the list of admitted claims, and to pay dividend accordingly. It does not appear to me clear that one of the bankrupts should be allowed to represent any claim against the estate; but I leave this matter for the present to the consideration of the District Judge.

The order complained of will be reversed, and the case remanded for further proceedings.

Opinion by CHASE, Ch. J.

DISTRICT OF SOUTH CAROLINA.

GOODING v. VARN.

June Term, 1869.

The Statute of Limitations was suspended as between citizens of the Confederate States and citizens of those states which adhered to the National Government during the whole period of the war. As far as South Carolina is concerned, the war began April 19, 1861, and ended April 1, 1866.

Statement of the Case.

This was an action of assumpsit on two promissory notes.

The defendant pleaded the general issue and the Statute of Limitations.

General replication to first plea.

Demurrer to second.

Ed. McCrady, Jr., for the plaintiff.

Campbell & Seabrook, for the defendant.

On the demurrer.

CHASE, Ch. J.—The plea of the statute of limitations is good. Without entering upon the questions discussed by counsel it is sufficient to say that the state of war existing between the state of South Carolina and the government of the United States rendered unlawful all intercourse between citizens of that state and citizens of those which adhered to the National Govern-

Opinion by CHASE, Ch. J.

ment. The latter could not sue in the courts of South Carolina ; all legal remedies therefore were denied them during the war, by the war.

The period of the beginning and termination of the war varies in different states. It began with the President's proclamation of blockade, being the first exercise of belligerent rights, April 19, 1861. It was then that the existence of civil war was first formally recognized by the National Government. The end of the status of war as to South Carolina, is to be considered as being April 1, 1866, the proclamation of the President of that date having declared it terminated thenceforward.

The demurrer to the plea of limitations must therefore be overruled.

Statement of the Case.

IN RE MITTELDORFER.

EX PARTE ROWLAND.

When one or more creditors petition for and procure an adjudication of bankruptcy against a debtor, they may on motion be reimbursed their reasonable expenses.

The fund is the fruit of the diligence of such creditors, and it would be manifestly unjust to compel them to bear alone the expenses incurred for the benefit of all.

Whenever a claim for reasonable expenses so incurred is made and admitted by the assignee, an order should be made by the District Judge for its payment.

Statement of the Case.

This was a petition under the second section of the bankrupt act, for the review of an order of the District Judge allowing a claim for expenses incurred by the petitioning creditor, in procuring the adjudication of bankruptcy in this case.

These parties, Moses and Charles Mitteldorfer, were adjudicated bankrupts upon the petition of Messrs. Lathrup, Ludington & Co. of New York, creditors, and assignees were duly chosen and qualified and took possession of the assets. S. S. Rowland, styling himself attorney, and purporting to act for and at the instance of a majority of the creditors, submitted a bill of expenses and disbursements made on their behalf. The items were as follows :

Deposit fee.....	\$50.00
Keeper's fee in charge of store to February 1.....	70.00
Marshal's fee taking inventory.....	185.00

Statement of the Case. /

Insurance on stock goods	\$40.00
Expenses and services in attending trial and adjudication of bankruptcy	220.00
Attending meeting of creditors, and representing majority in number and amount in electing assignees.....	150.00
Trial and examination of bankrupts during three weeks.....	390.00
Paid E. Y. Cannon, extra counsel.....	250.00
	<hr/>
	\$1,455.00

Mr. Rowland swore before Register Bond, that the said disbursements and expenses had been necessarily and actually incurred and paid by him in the said proceedings in bankruptcy.

Register Bond endorsed his opinion on the bill that it should be paid before any general distribution of the assets, and the District Judge approved and allowed the same by order of the court.

The assignees refused to pay the said bill, whereupon the District Judge made an order stating that it "appeared to the satisfaction of the court that the costs and disbursements incurred in the proceedings in this matter have been duly taxed before the register in bankruptcy and certified to this court, and that an order allowing the same has been duly entered and served upon one of the assignees, and it further appearing, by the affidavit of S. S. Rowland, that the said assignee disregards the said order and denies the authority of the court in respect to the same," and directing the assignees in bankruptcy "forthwith upon the service of the order to draw their warrant or check upon the funds of said estate in their hands, for the sum of fourteen hundred and fifty-five dollars, negotiable and payable to the order of Lathrop, Ludington & Co.," and deliver the same to H. G. Bond, register.

The assignees thereupon petitioned the Circuit

Statement of the Case.

Court averring that the said orders were erroneous, and asking that the same may be reviewed and reversed for the reasons—

1. Because there has never been a taxation of the costs in the said cause. Such a taxation was demanded by one of your petitioners in behalf of himself and his co-assignee, and it was refused by the register, H. G. Bond, Esq.

2. Because what is pretended to be a taxation of costs, is nothing more than the account of the said S. S. Rowland, endorsed with the written opinion of the register in bankruptcy that it ought to be paid before any general distribution of the fund.

3. Because the said account is unsupported by any vouchers.

4. Because no opportunity was allowed to your petitioners to contest the items of said claim, it having been presented to the register in bankruptcy and irregularly endorsed by him, was ordered by the District Court to be paid without having been referred to your petitioners for examination.

5. Because the said account is upon its face extortionate and unjust, the major part of said claim being for services as counsel, that is to say the sum of eleven hundred and ten dollars, of which eight hundred and sixty dollars are for the legal services rendered by the said Rowland, the remaining two hundred and fifty being for the services of E. Y. Cannon, Esq., a regular practicing attorney in the said court.

6. Because the said Rowland, while he pretends to be an attorney, is in truth and in fact as your petitioners are informed and believe a regular employee in the house of Lathrop, Ludington & Co., at a regular annual salary. He is certainly not a regular practicing attorney in this city, and has never paid the license tax required by the state of Virginia and city of Richmond to be paid by all practicing attorneys.

Statement of the Case.

7. Because the services of one regular practicing attorney were quite sufficient for all the purposes of the case, and the fee said to have been paid by the said Rowland to E. Y. Cannon, Esq., was ample remuneration for the necessary legal services.

8. Because the money pretended to have been paid by the said Rowland, was in truth and, in fact paid by his employers, and this "bill of costs" is but another attempt upon the part of the said Rowland to secure for his employers an undue share in the proceeds of the bankrupt's effects.

9. Because the said Rowland being regularly in the employ of said Lathrop, Ludington & Co., was required by them as their employee to do what he now pretends to charge for as counsel, and if other creditors agreed to unite with his employers in the proceeding and requested the said Rowland to act for them, it is the duty of such creditors to contribute their rateable proportion out of their private funds, to pay him; they certainly have no right to require that other creditors, who neither employed Mr. Rowland nor desired his services, should be required to contribute to pay him (or his employers) anything, much less the unnecessary, extravagant, and extortionate claim for legal services said to have been rendered by him at the request of a majority of the creditors. So far as the proper charge for the services of Mr. Cannon, who was regarded as the counsel in this case, and other proper items in the account have been paid by Messrs. Lathrop, Ludington & Co., there of course will be no objection to refunding them, when proper vouchers are produced by them; but it would be monstrous that one fourteenth of the whole assets should be absorbed by this "bill of expenses," and thus to increase the dividend of Lathrop, Ludington & Co., and diminish that of every other creditor in the cause.

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Opinion of CHASE, Ch. J.

Thomas P. August, for the petitioner.

L. H. Chandler and *H. G. Bond*, for the respondent.

CHASE, Ch. J.—This is a petition for a revision of the allowance by the register in bankruptcy, and confirmed by the District Court, allowing a certain compensation as counsel to S. S. Rowland, for services in procuring the adjudication of the bankruptcy.

The claim of Rowland, who styles himself attorney, was presented to Register Bond, purporting to be an account of expenses and disbursements in behalf, and at the instance of a majority of the creditors. It amounted to one thousand four hundred and fifty five dollars, including a counsel fee of two hundred and fifty dollars, paid to E. Y. Cannon, Esq. The account was sworn to by Rowland, and received the endorsement of the register to the effect that he should be paid before any general distribution of the funds, and was afterwards, on May 5, allowed by the District Court. Afterwards, on October 28, 1868, the District Court made an order, reciting, among other things, that it appeared to the satisfaction of the court that the costs and disbursements incurred in the proceedings had been duly taxed before the register in bankruptcy, and certified to this court, and that the order allowing the same had been duly entered, and served upon one of the assignees, and that it further appeared by the affidavit of S. S. Rowland, that the assignee disregarded the order, and denied the authority of the court in respect to it; and thereupon the court ordered the assignee forthwith to pay the sum by warrant, or check upon the funds of the estate for the sum of one thousand four hundred and fifty dollars, negotiable and payable to the order of Lathrop, Ludington & Co., and deliver the same to Register Bond, if sufficient funds

Opinion of CHASE, Ch. J.

belonging to the estate of the bankrupts were in the hands of the assignee.

The petitioners claim that the orders were erroneous, and ask that they be reversed. They insist that there has been no taxation of costs in this case, that what has been called a taxation of costs is nothing but the account of Rowland, with the opinion of Register Bond endorsed upon it that it should be paid before any general distribution of the funds; that the account is unsupported by any vouchers; and that it had not been sent to them for their examination and report; and that no opportunity to contest the items of the claim had been afforded to the petitioners; that the account itself is exorbitant and unjust, a great part of the claim, that is to say, one thousand one hundred and ten dollars being for services as counsel; of which eight hundred and sixty dollars are for legal services rendered by Rowland, the remaining two hundred and fifty dollars for the services of E. Y. Cannon, Esq., attorney, Richmond; that Rowland was not an attorney, but an employee of Lathrop, Ludington & Co. at a regular annual salary; that the money pretended to be paid by Rowland was in fact paid by his employers; and that the bill of costs is but an attempt on their part to secure an undue share in the proceeds of the bankrupt's effects.

There can be no doubt where one or more creditors petition for, and procure an adjudication of bankruptcy against a debtor, they may on motion be reimbursed for their reasonable expenses. The fund is the fruit of the diligence of such creditors, and it would be manifestly unjust to compel them to bear alone the expenses incurred for the benefit of all. Such was the opinion of Judge BENEDICT, in the matter of Julius Schwab, an involuntary bankrupt, as reported in 2 *B. R.* 155. In his opinion the judge cites the opinions of other District Judges to the same effect.

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It is clear, therefore, that all reasonable expenses incurred by Lathrop, Ludington & Co., as the petitioning creditors in this case, should be allowed to them, and it will be proper when their claim is made and admitted, that an order should be made to this effect by the District Judge.

The assignees, however, complain that the allowance made is excessive, and I am inclined to think, with reason; certainly an opportunity must be afforded them to contest the items of the claim.

I shall, therefore, reverse the orders made in the District Court, and the case will be referred back to that court with instructions to allow the petitioning creditors to file a claim for the expenses incurred by them, and to allow such sum as shall appear just and reasonable in the circumstances, having due regard to the interests of the other creditors (In re Williams, 2 *Bankt. Reg.*, 28, per Judge BRYAN; in re Wait, *Id.*, 146, per Judge LOWELL).

Statement of the Case.

DISTRICT OF VIRGINIA.

IN THE MATTER OF JOHN D. ALEXANDER, A BANKRUPT.

May Term, 1869.

The jurisdiction of superintendence conferred upon the Circuit Court by the second section of the bankrupt act, must be exercised over proceedings in bankruptcy already pending in the District Court, and it seems to be a reasonable interpretation that it does not extend to decisions of the District Court from which appeals may be taken.

By the eighth section of the bankrupt act appellate jurisdiction is given to the Circuit Court in four classes of cases : 1. By appeals in cases in equity decided in the District Court, under the jurisdiction created by the act ; 2. By writ of error in cases at law decided in the exercise of that jurisdiction ; 3. By appeal from decisions rejecting wholly or in part the claims of supposed creditors ; and 4. By appeal from decisions allowing such claims.

The suits belonging to the first two classes of cases, seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the eighth section ; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the District Court elsewhere than in the third clause of the second section ; though this jurisdiction may be well enough held to be included in the general grant of the first section.

The appellate jurisdiction, strictly so called, conferred upon the Circuit Courts, is limited to controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants, touching the allowance of claims.

The right of appeal, as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeals is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal, in any case, under the bankrupt act, from the District Court, unless it is claimed, and the bond is filed at the time it is claimed, and notice of it is given, as required by the eighth section of the act, within ten days after the entry of the decree or decision appealed from ; or unless it is entered at the

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term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed.

The only construction which gives due effect to all parts of the act relating to revisory jurisdiction seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the eighth section; and, on the other, brings within that category all decisions of the District Court or the District Judge at chambers, which can not be reviewed upon appeal or writ of error under the provisions of that section.

The exercise of this jurisdiction is left to the sound discretion of the Circuit Courts.

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John D. Alexander was duly adjudicated a bankrupt on his own petition, and filed the usual schedules of his debts and assets.

Among the debts was a judgment due Bagley, which judgment had been duly docketed under the law of Virginia in the counties where the real estate of the bankrupt lay, and thereby became a lien on such real estate.

With a large number of other debts, was one due Miller, by three bonds, each for seventeen thousand dollars, dated December 24, 1864, and payable from five to six years after date. These bonds were endorsed by John Alexander, the son of the bankrupt, and were secured by a deed of trust on a plantation sold by Miller to Alexander, which deed was of even date with the bonds, and was given simultaneously with the sale, and of course were the first lien on the property.

John Alexander had a lease of this plantation from his father, which would expire, if proper notice was given, on the first day of January, 1870, six months' notice being necessary to oust this tenant.

The assignee of the bankrupt filed a petition to sell

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the real estate, free and discharged from all encumbrances.

On this petition Bagley showed cause against granting it until the bonds held by Miller were scaled down to their alleged proper value in legal money, they having been executed December 24, 1864, at a time when one gold dollar was worth sixty dollars of Confederate currency, and when the bonds would fall due, that currency would be utterly worthless. He claimed that the bonds must be either reduced to their gold value as of the date of their execution, or else must be considered as payable in a worthless currency, and therefore be now adjudicated as having no value, and therefore constituting no lien on the plantation covered by the deed of trust.

If this was established, of course Bagley's judgment would become valuable as a valid lien on valuable property.

John Alexander also showed cause, and claimed that the bonds held by Miller, and endorsed by him, should be scaled according to Bagley's contention—whereby he either would be relieved from all responsibility on them, or that by the great reduction they would undergo by the scaling process, the property would produce more than enough to pay them, and thus relieve him. It was shown that at the present or any past value of the plantation it would not bring more than twelve thousand dollars, never having brought or been valued at more than that in gold times. Alexander also claimed that any order of sale ought expressly to reserve his rights under the tenancy, or that he ought to be compensated for ousting him, therefrom, out of the first proceeds of the real estate, before Miller's deed of trust.

Miller, on the other hand, appeared and consented to the sale, but claimed to have the first lien under his deed of trust for fifty-one thousand dollars, and inter-

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est from December 24, 1864, in lawful money of the United States. It was admitted that the value of the plantation before or during the war never exceeded twelve thousand dollars on a gold standard ; but he contended that the purchase of the plantation at that price, payable at rates so far in the future, was a contract of hazard, in which he took the chance that the currency in existence when the bonds became payable, would be more valuable than it was when they were made, and that the Alexanders, father and son, assumed the hazard that it would be less so. He claimed that the bonds were payable in the currency in existence when they fell due.

The District Judge refused to scale the bonds, and on March 16, 1869, passed an order directing a sale of the estate, allowing Miller to bid and to pay his bonds at their full value on account of the purchase money, in case he purchased it, as it was almost certain he would do.

From this order the assignee appealed, on the solicitation of Bagley and Alexander, who gave him security against costs of the appeal, and agreed to furnish also the appeal bond required by law. Not having been able to do so within the ten days required by the statute, these proceedings having taken place at Alexandria, in chambers, while they were all required to be entered in the clerk's office in Richmond, while the estate and the parties were in and near Lynchburgh, the District Judge extended the time for filing the bond, and it was duly approved and filed within the time thus extended.

Bagley and Alexander were thus satisfied that their rights were perfectly protected by the *supercedas* of the bond and by the appeal which would ensue on adjudication by the Circuit Court, then about to meet.

After that court had been in session several days, the parties always considering themselves as the

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parties prosecuting the appeal, and substantially interested in it, after the court had adjourned one day, and the appeal was to be heard the next, the assignee informed them that he had authorized the counsel for Miller to move in his (the assignee's) name for the dismissal of the appeal.

Thereupon they prepared a petition, setting forth the facts, that the time for appeal had expired, and they were helpless unless the Circuit Court would supervise these proceedings under the power given in the second section of the bankrupt act.

For the petitioners, Bagley and Alexander, Bradley T. Johnson moved for leave to file this petition, and for an order restraining the District Court from proceeding further in the matter until this court had heard and determined the cause.

He urged that the petitioners had been taken by surprise, and if they were obliged to wait until this court issued an order commanding the assignee and Miller to appear and answer the charges in the petition—the assignees would in the meantime act in concert with Miller, as they had done before ; would sell and convey the property to Miller, under the unrescinded or unsuperseded order of the District Court—and the supervision of this court be thus rendered nugatory.

L. H. Chandler and *Charles Dabney*, for Miller, showed cause why the petition should not be filed.

CHASE, Ch. J.—A petition has been presented to the court by P. C. Bagley and John Alexander, for the revision of an order of the District Court. It appears that among the assets of the bankrupt was a tract of land, encumbered by a deed of trust, executed by him on December 24, 1864, in favor of William D. Miller, to secure the payment of three bonds, each for seventeen thousand dollars, payable in four, eight, and

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twelve years from date, respectively ; that the petitioner, Alexander, is tenant of the tract, under the assignee, claiming a term which will not expire until January 1, 1870 ; and that the petitioner, Bagley, holds a judgment, which is a lien on the real estate of the bankrupt, and is claimed to be the next lien after the deed of trust.

On March 16, 1869, the District Court made two orders, one directing the assignee to sell the land, and the other directing that Miller might become the purchaser, and that the assignee should receive the amount of his bid in the trust bonds at par.

The petitioners as soon as these orders came to their knowledge prayed an appeal in the name, and with the approval of the assignee, and immediately notified Miller and the clerk of the District Court of their appeal.

The time for filing the bond on appeal was extended by the order of the District Judge until April 18, and on the 14th an order was passed showing that the assignee had filed his bond in the penalty of ten thousand dollars. On May 6, the assignee informed the counsel for the petitioners that he would not allow the use of his name in the prosecution of this appeal.

The petitioners, therefore, ask in consideration of the surprise occasioned to them by this information, and also upon the ground that an appeal from the order of the District Judge in such a case as that before him is not allowed by the act, that the court will give them leave to file their petition now presented and grant them appropriate relief.

The petition invokes the exercise of the jurisdiction of superintendence, conferred upon the Circuit Courts by the second section of the bankrupt act, which provides that "the several Circuit Courts within and for the district where the proceedings in bankruptcy shall be pending, shall have a general superintendence and

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jurisdiction of all cases and questions arising under this act ; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.”

In the consideration of this petition it becomes necessary to ascertain, if possible, the nature and extent of the jurisdiction thus conferred.

It is clear that it must be exercised over proceedings in bankruptcy already pending in the District Court, and it seems to be a reasonable interpretation, that it does not extend to decisions of the District Court from which appeals may be taken.

By the eighth section, appellate jurisdiction of such decisions was conferred upon the Circuit Court in four classes of cases : 1. By appeal in cases in equity decided in the District Court, under the jurisdiction created by the act ; 2. By writs of error in cases at law, decided in the exercise of that jurisdiction ; 3. By appeal from decisions rejecting wholly or in part the claims of supposed creditors ; and 4. By appeal from decisions allowing such claim.

In the first two classes of cases, the appeal or writ of error is given to the unsuccessful party to the suit, whether in equity or at law ; in the third class it is given to the dissatisfied creditor ; in the fourth to the dissatisfied assignee.

The suits belonging to the first two classes of cases, seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the eighth section ; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the District Court elsewhere than in the third clause of the second section ; though this jurisdiction may be well enough held to be included in the general grant of the first section.

If this view is correct and the jurisdiction of the Dis-

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strict Court under the act spoken of in the eighth section is the jurisdiction defined by the third clause of the second section, the appellate jurisdiction by appeal and writ of error, from decisions in the exercise of that jurisdiction, must be regarded as limited to suits at law, or in equity, by assignees against persons claiming adverse interest, or by such persons against assignees.

From these premises the necessary deduction is that the appellate jurisdiction, strictly so called, conferred upon the Circuit Courts, is limited to the controversies between assignees and the claimants of adverse interests and to controversies between assignees and creditor-claimants touching the allowance of claims.

But there must be, obviously, numerous decisions by the District Courts and District Judges sitting at chambers, which are not included in either of these categories.

The order complained of in the petition is an example: It is not a decree in equity; nor a judgment at law; nor a rejection of claim in whole or part; nor an allowance of a claim.

From this order, then, it is clear no appeal could be taken.

On this point there seems to have been a misapprehension both of counsel and of the District Judge; for an appeal was allowed, though not in time; and afterwards the time for filing the appeal bond was extended. Of this nothing more need be said now than that the right of appeal as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeal is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal in any case, under the bankrupt act, from the District Court, unless it is claimed and bond is filed at the time it is claimed, and notice of it is given, as required by the eighth section of the act, within ten days after the entry of the decree or decision appealed from;

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or unless it is entered at the term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed.

This is mentioned here only to correct the misapprehension which seems to prevail, concerning the jurisdiction of this court upon appeals.

Returning, then, to the order mentioned in the petition, and finding it as already stated to be one from which no appeal can be taken, the conclusion is inevitable that it is one which may be reviewed in the exercise of the power of general superintendence, or that it can not be reviewed at all.

It may be said that the superintending jurisdiction does not extend to decisions of the District Court, or of the District Judge at chambers; and, certainly, if it does not extend to both, it extends to neither; for the first section of the act gives the same jurisdiction to the District Judge at chambers as to the District Court. This construction would limit the revisory jurisdiction of the Circuit Court to that given in the eighth section. But it is plain that this construction is not the correct one. It would, indeed, nullify the operation of the most important clause of the second section; for it would limit the superintending jurisdiction to the proceedings of assignees and registers; and these seem to be already placed by the first clause under the supervision of the District Court. The better, and indeed as it seems to me the only construction which gives due effect to all parts of the act relating to revisory jurisdiction, seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the eighth section; and on the other, brings within that category all decisions of the District Court or the District Judge at chambers, which can not be reviewed upon appeal or writ of error under the provisions of that section.

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The exercise of this general jurisdiction is not placed by the act under specific regulations and restrictions like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulations to the discretion of the court and to the rules to be prescribed by the Supreme Court. As yet, the Supreme Court has prescribed no rule concerning it; nor has this court.

In the case before us, its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed. Nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated.

Leave is given to file the petition, and other questions are reserved until the coming in of affidavits; and in the meantime let further proceedings under the order of the District Court be suspended.

Statement of the Case.

WOODSON v. FLECK ET AL.

The government of Virginia organized at Wheeling, has been recognized by the United States as the rightful government of that state.

After all organized resistance to the national authority had ceased in Virginia, that government was established in undisputed exercise of its authority at Richmond. That government was thus established during the year 1865.

When the *de facto* government of Virginia was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist.

They continued in being *de facto*, charged with the duty of maintaining order until superseded by the regular government.

Thus the common council of Harrisonburg, though elected under the *de facto* government, remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces.

It might have been superseded, for the government of the United States was not bound to recognize any authority which originated with the *de facto* government. But it was not superseded.

The mayor and common council, therefore, exercising their authority derived from their election, and not by virtue of a military order have no right to remove a suit from the state to a Federal Court, when that suit has been brought for an alleged false imprisonment, and malicious prosecution thereon, charged to have been committed by them in the discharge of their municipal functions.

The courts of the United States are not constituted guardians of the public peace under state laws.

These matters are left absolutely to the state courts.

These courts watch over personal rights and private security so far as these depend on state laws, and individuals who exercise local authority are responsible to them.

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The town council of Harrisonburg in Rockingham county, Virginia, had been elected under the laws of

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the state at the regular town election during the war, and some time before its termination, the town and county being part of the recognized state of Virginia, and within the Confederate military lines of occupation.

After the surrender of the Confederate army under General Lee, on April 9, 1865, the war in fact terminated in Virginia, and in a very short time all resistance to the Federal troops ceased.

The town authorities of Harrisonburg, their town having been occupied by a garrison, ceased to meet or discharge any of their duties for a while, the military undertaking the entire police and management of affairs on themselves. On June 16, 1865, however, the post commander at Harrisonburg issued a general order which was published and promulgated to the citizens as general order No. 10, addressed to them and notifying them "that the mayor and council of the corporation last in office upon the resumption of their duties, will be sustained in all their acts consistent with existing laws and proclamations of the government." Upon this the local government reorganized itself and resumed the exercise of its functions; among other things electing as town sergeant one of the defendants.

Some time after this a riot broke out which was quelled by the exertions of the mayor and town sergeant, and in the course of their efforts to maintain the public peace they arrested the plaintiff Woodson. It seems that Woodson was asserting, and may be proclaiming, that the mayor and town sergeant had no authority to act as officers; that they were mere usurpers; the government of the town having perished with the state government under which it was elected, and that general order No. 10 could not legally nor constitutionally recall into existence that power which had ceased to be, nor could it create them a new power *ab initio*.

Be that as it may—the powers that be arrested Woodson for inciting to riot or aiding it, and Wood-

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son on examination before a magistrate was discharged.

Whereupon he brought his action for malicious prosecution against the mayor, some members of the town council, and the town sergeant. After much contention before the state courts, and several trials and removals from one county to another, the defendants brought the case here on the ground that they were acting by virtue of the authority of general order No. 10, and being sued for acts done under or by virtue of orders of military officers of the United States, they had the right to remove it into this court by virtue of the acts of Congress of March 3, 1863, and May 11, 1866, and their supplements.

The plaintiff appeared in this court, and moved that the cause be remanded to the court whence it came, because it had been improperly removed, this court having no jurisdiction.

W. W. Crump and Roller, for the motion.

Bradley T. Johnson, opposed.

CHASE, Ch. J.—This a motion to remand the cause described in the record to the Circuit Court of Rockingham county. In considering it we are not at liberty to look at the merits of the controversy between the parties. The only question which we have to examine is that of jurisdiction.

The suit was originally brought in the county court of Rockingham county, in the state of Virginia, by a citizen of the state against other citizens of the state for malicious prosecution, and involved, apparently, no question arising under the constitution and laws of the United States.

It was removed from the state court into this court by an order of the Circuit Court of Rockingham county,

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in supposed conformity with the acts of Congress providing for such removal of certain suits for acts done in obedience to the orders of the national authorities during the recent war.

We are to inquire whether the suit thus removed is one of those for the removal of which provision has been made by Congress. If not, it is clear that we have no jurisdiction of it, and it must be remanded to the court from which it came. The modes of removal were provided by the acts of March 3, 1863,* and May 11, 1866†—one by transfer before verdict, another by appeal after judgment. It is not necessary here to consider the second. The first, under the act of 1863, was a proceeding by petition of the defendants filed after entering an appearance; or if appearance had been entered prior to the date of the act, then at the next session of the court. Under the act of 1866, the proceeding for removal might be resorted to at any time before the empaneling of a jury to try the cause.

The suits which might be removed in one or the other of these modes, according to the condition of the particular case at the time of the proceeding for removal, are fully described in the two acts already referred to. If the suit now under consideration comes within any description of these acts, it is certainly described by the first section of the act May 11, 1866. That description includes suits for any act done during the rebellion by any officer or person under any order issued by any military officer of the United States holding the command of any district or place within which such act was done by the person or officer for whom the order was intended, or by any other person aiding or assisting him therein. If this description does not sanction the act for which the suit in controversy was brought, it was not, as we think, within the meaning of either act of Congress.

* 12 U. S. Stat., 756.

† 14 Id. Stat., 46.

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What, then, were the facts in relation to these suits?

Two of the defendants were members of the town council of Harrisonburg. The other was the sergeant of the corporation appointed by the council. The members of the council were elected during the war, while Harrisonburg was within the Confederates lines and under the control of the insurgent government of Virginia.

The sergeant of the corporation was elected after all organized resistance to the national authority had ceased in Virginia, and after the state government, which had been organized at Wheeling, and recognized by the United States as the rightful government of Virginia, had been established in undisputed exercise of its authority at Richmond.

This suit was brought by Woodson against certain members of the town council of Harrisonburg, and against the town sergeant, for malicious prosecution. The facts appear to be that he was arrested; that his case was examined with reference to further proceedings; and that he was discharged by the justice of the peace who conducted the examination.

The first question is, Whether that arrest under the direction of the town council by the town sergeant was an act done in pursuance of any order of the officer in command of the district? We have been referred to general order No. 10, issued from the post head-quarters on June 16, 1865, by the military officers then commanding the district in which Harrisonburg was situated.

It is to be borne in mind that the members of the common council of Harrisonburg had been elected to that office while the insurgent government of Virginia was in entire control of that portion of the state. When that government was dispersed by the superior force of the United States, the civil authorities did not necessar-

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ily cease at once to exist. They continued in being *de facto*, charged with the duty of maintaining order until superseded by the regular government.

Thus the common council of Harrisonburg remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces.

Doubtless it might have been superseded. The government of the United States was not bound to recognize any authority which originated under the insurgent government. But it was not superseded. On the contrary, an order was issued, addressed to the citizens of Harrisonburg, Virginia, June 16, 1865, by which the citizens were notified "that the mayor and counsel of the corporation last in office, upon the resumption of their duties, will be sustained in all their acts consistent with existing laws and proclamations of the government."

Upon the promulgation of this order the council which had suspended its meetings, resumed its functions. It appointed a town sergeant, who was duly qualified. Shortly afterwards a riot broke out in the town and the defendants, especially the mayor and the town sergeant, were very active in quelling the disturbance. We have no means of judging how great or how dangerous the disturbance was. It had no connection with the military occupation, nor any relation to the authority of the United States. It was an ordinary riot, and the mayor and town sergeant busied themselves in suppressing it. In doing so they arrested rightfully or unrightfully Woodson, the plaintiff in this suit.

Now, was that act done in pursuance of the order of the post commander? There was nothing in the order relating to any such matter. It was not addressed to the council. It did not require them to arrest anybody. It did not command them to suppress a riot. It simply

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declared that the council would be sustained in its legitimate action as the town government. It would be going too far, we think, to regard this arrest as an act done in pursuance of an order of any officer of the United States. On the contrary, it seems to us to have been an act intended, at least, as an ordinary exercise of authority by the town council and town sergeant under the laws of Virginia.

The courts of the United States have nothing to do with such matters. They are not constituted guardians of the public peace under state laws. On the contrary, these matters are left absolutely to the state courts. The state courts watch over personal rights and private security so far as these depend on state laws. Individuals who exercise local authority are responsible to them, and both are responsible to the people of Virginia.

We think, therefore, that this is not a case within the description of the act of Congress. We are clearly without jurisdiction of it, and must remand it to the Circuit Court from whence it came.

A second question has been somewhat discussed, namely: Whether, if the order in question could be regarded as directed to the corporate authorities of Harrisonburg, and the arrest of Woodson as actually made under that order, the arrest so made would warrant the removal of Woodson's suit for malicious prosecution into the United States Court, after the restoration of the state government at Richmond, in the spring of 1865? But the view which we take of the first question in this case makes the present consideration of this point unnecessary.

Statement of the Case.

HEAD v. STARKE'S ADMR.

It being agreed that the most prudent and careful business men were in the constant habit of making investments in Confederate bonds, it would seem unreasonable to call in question the good faith or prudence of the administrator who does likewise.

Especially is this so when such investment by an administrator is sanctioned by the state court. Even if there had been no such decision, this court will not say that the administrator ought to be charged, if the investment were free from objection on other grounds.

It would seem, however, that where a trustee held funds in the Confederacy, for the benefit of parties within and adhering to the United States, that an investment of such funds in Confederate bonds will not exonerate such trustee from accounting for the value of the funds invested, to his non-resident *cœtui qui* trustees.

Dealing in Confederate currency which was imposed on the community by irresistible force is essentially different from an actual advance of money to the Confederacy itself.

In this case there was an investment of trust funds, entirely voluntary on the part of the administrator, on a loan to the Confederate government, to aid it in its efforts to dismember the Union.

This administrator paid his trust fund actually into the treasury of the Confederate States, and received directly from the treasurer a Confederate bond for the amount so paid in.

Such an investment can not receive the sanction of a court of the United States.

It is inoperative as a discharge from responsibility.

The facts of this case are fully stated in the opinion of the court.

CHASE, Ch. J.—This is a suit in equity, brought to enforce payment by the defendant to plaintiffs of their distributive shares of the estate of the decedent, John Starke.

The proof shows that the plaintiffs, Adeline Head

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and Charlotte R. Starke, were children, and are the only surviving heirs of John Starke, and that the defendant had in his hands as administrator on January 31, 1860, the sum of seven thousand two hundred and forty-nine dollars and eighty-eight cents, belonging to the estate. It is claimed by the defendant that he subsequently disbursed considerable sums in payment of just claims against the estate, by which the balance in his hands was so far reduced that on September 20, 1863, only the sum of five thousand and odd dollars remained.

The defendant states that the records and papers of the Hanover county court were destroyed by fire, and among them the records of the settlement by which this balance of about five thousand dollars was ascertained.

It is agreed by counsel that the records in sundry cases, in which certain decrees and orders were made affecting the balance in the hands of the plaintiff, were destroyed by the fire mentioned by the defendant; but there is no agreement that the record of the last settlement on which he relies was thus destroyed.

It appears in proof that the defendant, as administrator, invested five thousand dollars in the loan of the states then confederate in armed hostility to the United States, and received from the officers of the so-called Confederate government, a certificate for that sum.

It is not disputed on the part of the defendant that there must be a decree for an account, and that he is liable to the complainants for whatever balance may be found in his hands exceeding the five thousand dollars.

The important questions in the case are two :

1. Was the investment in the loan of the Confederate states one which a prudent person acting as trustee or administrator might make? And

2. Was the investment being actually made in a loan to a politico-military organization formed for the

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purpose of overthrowing the union of the states under the national constitution, and establishing a new confederation in a portion of those states one which, under any circumstances, can be recognized in the courts of the United States as excusing the administrator from accounting for the funds in his hands to the parties otherwise entitled lawfully to receive them?

Upon the first question little may be said. It must indeed be regarded as already decided. The court of the state authorized by law to consider and sanction investments by administrators sanctioned the loan under considerations; and it is agreed that the most prudent and careful business men were in the constant habit of making such investments.

It would seem, therefore, to be unreasonable to call in question the good faith or prudence of the administrator in the circumstances by which he was surrounded. If there had been no decision of the state court approving the investment, we could not say that the administrator ought to be charged if the investment were free from objection on other grounds.

~~at~~ This makes it necessary to consider the second question. But we need not examine it at length, for in the case of *Botts v. Crenshaw*, in this court, we held that investment even of Confederate currency in Confederate bonds by an attorney who had collected a debt due to a citizen of Kentucky, in that currency under what were considered to be justifying circumstances did not absolve him from accounting for its value, although in that case as in this the investment had been sanctioned by a court, whose decision but for the abnormal condition created by the rebellion would have been conclusive.

This case, we think, covers the present in principle. So in the case of *Shortridge v. Macon*, the Circuit Court of the United States for the District of North Carolina, speaking through the presiding judge of the court held

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that compulsory payment to a receiver under an order of a court of the Confederate States of a debt due to a citizen of Pennsylvania, did not excuse the debtor from the duty of paying the same due to the original creditor.

And we think that these decisions are sustained by the reasoning of the Supreme Court in the case of *Texas v. White* (7 *Wall.* 733).

Nor is there anything in the case of *Thorington v. Smith* (8 *Wall.* 12), which conflicts with the case of *Botts v. Orenshaw* and *Shortridge v. Macon*. In that case the Supreme Court held that contracts stipulating for payment in Confederate currency "can not be regarded for that reason only" as void, but in this case there was something more than the mere use of the currency imposed on the community by irresistible force. There was an actual advance of money to the confederacy itself. There was an investment of trust funds, entirely voluntary on the part of the administrator, in a loan to the Confederate government to aid it in its efforts to disremember the union, and to overthrow the national government.

Whatever may have been the motive inducing such an investment, however it may have been warranted by example, or even by judicial authority, itself involved in the general rebellion, it is impossible that it should receive the sanction of a court of the United States.

We must hold, therefore, the investment complained of to be inoperative as a discharge from responsibility to complainant, and will so decree, ordering an account by the defendant with the complainants and payment of such a sum as may be found due.

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DISTRICT OF VIRGINIA.

BIGLER v. WALLER.

The Supreme Court of the United States having held (*Hanger v. Abbott*, 6 *Wall.* 532) that the late war suspended the statute of limitations, and in *Ward v. Smith* (7 *Wall.* 452), that interest did accrue during the war, in that particular case, making an exception to the general rule that interest does not accrue between citizens, or subjects of belligerent states, it may not unreasonably be inferred from the language of the court that if the direct question came before them it would be decided that interest did not accrue between parties to the late civil war.

It is the duty of this court to decide the question as it believes the Supreme Court would decide it. Bigler, a citizen New York, was indebted to Waller, a citizen of Virginia, in the sum of thirteen thousand dollars, due for land sold by Waller to Bigler, which sum was due and payable May 10, 1861.

Bigler was excluded from occupation of the estate during the war, the improvements placed on it by him were greatly injured, and Waller was entitled to possession during the war by virtue of a sale under a trust deed and purchase by him of the property.

If interest on a debt should cease in any case it should in this.

The proclamation of President Lincoln of April 19, 1861, declaring a blockade of the ports of the insurgent states must be regarded as the first formal recognition of the existence of civil war by the national authority.

The Supreme Court has held that the war ended on August 2, 1866, so far as the captured and abandoned property act is concerned, but they have declined fixing any precise date termination applicable to all cases.

In this case the establishment of the adhering government of Virginia at Richmond as the recognized government of the whole state is to be taken as the end of the war in this state.

This event took place when the executive department of that government was removed from Alexandria to Richmond, on May 26, 1865. The period to be excluded in the computation of interest is the time from April 19, 1861, to May 26, 1865. Confederate money received

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by Waller from the Confederate government, for damages done the property after Waller was in possession of the same, must be scaled down to its gold value as of the date of its receipt and interest to be calculated on the sum thus ascertained. For the amount of this payment and interest Bigler's debt to Waller is to be credited. The proof of damages to Bigler by reason of Waller not performing certain covenants in his contract of sale being too vague and unsatisfactory to form the basis of decree, no damages are to be allowed him.

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Bigler, a citizen of New York, in May, 1853, purchased from Waller, a citizen of Virginia, the estate of Rippon Hall, consisting of two thousand acres of land, and improvements, lying in the county of York, and state of Virginia. Bigler was to pay Waller thirty thousand dollars for the estate, five thousand dollars in cash and the residue divided during a period of ten years, and accordingly Walker, on May 10, 1853, executed and delivered to Bigler, a deed of the property, who thereupon paid Waller five thousand dollars in cash, and on June 23, 1853, executed and delivered to Saunders as trustee, a trust deed reconveying Rippon Hall to him to secure the payment of the twenty-five thousand dollars due Waller. These payments were to be two thousand dollars on May 10, 1855, with interest on the whole sum unpaid, and one thousand dollars annually on that day, with interest on the whole sum unpaid, until May 10, 1863, when the whole of the twenty-five thousand dollars then unpaid was to become due and to be paid. It was provided that the failure to pay any one of these sums would be considered "a defalcation which shall authorize Waller to require Saunders to execute this trust according to law." It was provided that in case of a sale sixty days notice should be given in newspapers in Richmond, and the city of New York.

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Bigler paid all the installments provided for in this deed of trust up to and including May 10, 1860, leaving thirteen thousand dollars due as purchase money secured by this trust deed. He also improved the property by the erection of wharfs, mills, and buildings, and laid off a village and town lots, and built school-houses, and other improvements. But York county extends along the York river to the Chesapeake, and contains within its limits Yorktown, the scene of the termination of the first invasion of Virginia.

It is open to the sea, and is covered by the guns of any hostile fleet which rides the waters of its great boundaries, consequently at the first approach of civil war, the Rippon Hall enterprise was abandoned by its owner and projector, who returned to New York, and made no further sign until June, 1865, when he returned and resumed possession.

In the meantime his installment payable May 10, 1861, had become due, and being absent, and presumably unable to return, he did not pay it.

Waller then required Saunders, the trustee, to sell under the deed of trust, which he did on April 1, 1862, Waller himself becoming the purchaser for seventeen thousand dollars in money, which was then quite equal in value to greenbacks, and Saunders conveyed the estate to Waller, on receiving Waller's note for the amount due over and above the sum which Bigler owed him.

No notice of course was published of the sale in the papers of the city of New York, the state of Virginia then exercising control of York county.

In May, 1862, the buildings on the estate were burned by Colonel Duke, an officer of the Confederate army, and the military line of the Confederate states receded up the Peninsula towards Richmond, while those of the United States as regularly followed them, at once inclosing York county and Rippon Hall. McClellan's

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move in the spring of 1862, placed that part of Virginia permanently within the Federal lines, and there was no reason in law nor fact why Bigler might not have returned to his property in June, 1862, and disregarded the said sale by Saunders of April, 1862. Waller adhered to the side of Virginia, and retired with the forces of the confederacy, and in 1863, secured the payment of two thousand dollars in Confederate currency for the injury done to the Rippon Hall estate.

When the war was over, it seems to have been at once understood that the sale and deed of April, 1862, by Saunders to Waller, were utterly void, for Bigler forthwith in June, 1865, re-entered into possession of his property, and Waller proceeded to bring suit against him in New York for the thirteen thousand dollars and interest, the balance of the purchase money due him.

At that time the courts of New York were much more apt to respect any rights which he might have had against Bigler, than those of the restored state of Virginia.

In order to draw off the attack in New York, this bill was filed in this court by Bigler against Waller, charging that Waller claimed thirteen thousand dollars due him for unpaid purchase money, when in truth there was not a cent due, which claim it was charged was a cloud on the title, and the court was prayed to remove the same, by decreeing that Waller owed money to Bigler for damages done the estate, during Waller's constructive possession, largely over and above the purchase money unpaid. Whereupon after much endeavor the New York proceedings were all stopped, and the questions came up before this court for decision.

J. K. Hayward, for complainant.—This suit was brought by James Bigler, of New York, against Wil-

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liam Waller and Robert Saunders, of Virginia, to remove a cloud from the title to plaintiff's estate situated in York county, Virginia, and called Rippon Hall.

I. In 1853, James Bigler, by his agent, F. W. Hammond, of Virginia, made an agreement in writing with defendant Waller to purchase for thirty thousand dollars, two thousand acres of land in Virginia, called Rippon Hall.

This agreement contained the following covenant :

“Said Waller will allow said Bigler to sell such portions of the land as he may see fit, from time to time ; the said Bigler paying over to said Waller, such proceeds of sales as will afford ample security for the liquidation of the residue of the debt.”

II. On May 10, 1853, Bigler paid five thousand dollars of the purchase money ; gave his bond for the balance, twenty-five thousand dollars ; took a deed of the property, and at the same time took possession of the estate.

III. On June 22, following, Bigler made and delivered a trust deed to Robert Saunders, to secure the payment of the bond, which deed provided for the sale of the estate in default of payment, according to the terms of the bond, in the following manner :

“It is understood that in case of sale, the trustee shall give sixty days' notice in newspapers in Richmond and in the city of New York.”

IV. The agreement for sale, bond and trust deed are *in pari marieta*.

V. The plaintiff made improvements on the estate consisting of a wharf, mills, hotel, store, church, school-houses, planted an orchard comprising some thirty thousand fruit trees, laid out a village, and built a large number of private residences, prior to 1857, at an expense of one hundred and fifty thousand dollars.

VI. In the spring of 1854, Bigler contracted to sell portions of said estate (village lots), but was prevented

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from effecting said sales by Waller's refusal to release his mortgage lien, which refusal damaged the plaintiff to great amount.

VII. The plaintiff fulfilled his agreement until May 10, 1861, when there were thirteen thousand dollars unpaid on the bond.

VIII. The plaintiff, by his tenants, was in actual possession of the estate until the war broke out, in April, 1861. His actual possession of the estate was resumed in June, 1865.

IX. On April 1, 1862, Waller caused a sale of the estate at public auction without the advertised notice provided for in the trust deed, and purchased it himself for seventeen thousand dollars Confederate money, took a deed from the trustee, and gave his notes for the balance of the purchase money over the amount claimed to be due on the bond.

Waller exercised various acts of ownership over the estate after this purchase, such as collecting rents, disposing of personal property, &c., as will more fully appear in a subsequent part of the argument.

X. The pleadings show that Bigler claims that the bond has been more than paid, by rent, waste and damages, for which Waller is liable; that the bond ought to be canceled, and judgment entered for the balance found due from Waller to Bigler; also that Waller and Saunders should execute to Bigler a release deed of all claim to said estate; while Waller claims that the sum of thirteen thousand dollars, with interest, still remains due on the bond, and that the mortgage deed should stand until this sum is paid.

XI. At the May term of this court, this cause was referred to George Chahoon, Esq., a commissioner of this court, to state an account between the parties, of what was due to Waller on the bond, and of the offsets in the nature of waste, rent and damages, due from Waller to Bigler; also to make such recommendations

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as he might think proper. The commissioner attended to his duty and filed his report in the clerk's office on November 2, 1867.

XII. Account A in said report finds thirteen thousand dollars, with interest, to be due from Bigler to Waller on the bond.

XIII. Account B in said report finds forty-three thousand dollars, with interest, to be due from Waller to Bigler on account of damage, waste and rent, claimed in plaintiff's bill.

XIV. Statement C shows a balance of twenty-six thousand one hundred and eighty-six dollars due from Waller to Bigler, for which judgment should be entered in favor of Bigler.

XV. Said report recommends that said bond be canceled, and Waller and Saunders execute a release deed to Bigler, of all claim to the land.

First. The item of three thousand dollars in account B is for Waller's breach of his covenant to release, contained in Ex. A. The evidence proves that soon after the sale May 10, 1863, Bigler laid out a "village" on the estate, and contracted with Johnson, Sterling, and Jones, together "with a half dozen others," to sell to each of them a "village lot," of "three or four acres," at "three hundred dollars per acre," each lot to be released from Waller's mortgage lien. Waller refused to release, and Bigler lost the sales of said lots thereby. These damages are specific and allowable, being the difference between the then possible price of three hundred dollars per acre, and the actual price afterwards obtained of ten dollars per acre. This Waller does not deny, and I apprehend that there can be no question concerning the amount of the damages suffered on account of the loss of said sales, there being no discrepancy in the testimony concerning this matter. And the court will not fail to observe that in proving the plaintiff's claim we have carefully avoided putting in

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evidence what might be considered in the nature of speculative or constructive damages. Waller does not deny his refusal to release the "village lots" to "Sterling, Johnson, and Jones," at the request of Bigler, nor attempt to lessen the amount of the land which he puts at "ten, fifteen, or twenty acres," or the price which it would have brought, to Bigler per acre, but claims that such release would have injured the estate, *i. e.*, impaired the security for his debt, to the amount of five thousand dollars. Now, it may be very well said that if the release of these lots would injure the estate five thousand dollars, it would benefit Bigler the same amount, and this sum might properly measure the damages incurred by the plaintiff by the loss of those sales, instead of the three thousand dollars found by the U. S. Commissioner. The only defense offered by Waller to this claim for damages was a "second contract," which Waller swore was made June 22, 1853, and which he avers was a substitute for the first; and he further testifies that he had the means of fixing its date precisely, and that it contained the following condition:

"The said Waller agrees that said Bigler shall sell such portions of land as he may see fit, provided it does not operate a serious reduction of the security afforded by the trust deed."

In regard to this second agreement, it will be remembered that Waller's deed to Bigler was dated May 10, 1853, and to pretend an agreement for the sale of real estate made more than a month after the sale was completed, and the title passed, is simply nonsensical and absurd.

Since Waller does not deny Bigler's offer to pay over to him all the purchase money of said land, the defense set up to this claim utterly fails.

I may remark, by the way, that, in explaining the loss of the "second contract," Waller swears in his

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answer that he deposited the same for record at the York county court-house, and he believed it was destroyed with the records at that place, but on learning from plaintiff's counsel that none of those records were lost, he was ready with another version of the story, equally explicit, and probably equally true.

If the force of this portion of Waller's testimony was not destroyed by the written evidence in the case, *e. g.*, the prior date of the deed, and the language of the bond, together with its own intrinsic contradictions, and was not specifically contradicted by Bigler and by Smith, we might insist upon the application of the maxim "*allegans contraria non est audiendus.*" The bond which Waller pleads recites that the contract for sale was "signed by Hammond," hence the sale must have been based upon the first contract, and not upon the "second," which Waller avers was signed by Bigler; *ergo*, Waller is estopped from setting up this "second contract."

The above facts demonstrate that the agreement of April 3, 1853, was the operative and the only contract between the parties antecedent to the debt.

The language of that instrument was "ample security" for the "residue of the deed."

This "residue" in the spring of 1854 was necessarily less than twenty-four thousand dollars, probably less than twenty thousand dollars, and the value of the estate, as improved, was more than sixty thousand dollars, leaving it "ample security" for the "residue" of the debt; and this even when diminished in value five thousand dollars (Waller's estimate of the damages for a release), which five thousand dollars would have itself been lessened three thousand dollars, what Bigler offered to pay for a release, leaving two thousand dollars actual damage, according to Waller's estimate, without considering the increased value of the estate from having a village built upon it.

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It is proved in evidence that this identical claim of three thousand dollars damage in a similar suit in the Supreme Court of the state of New York, between the same parties, Waller and Bigler, has been adjudicated already, and a judgment entered therein in favor of Bigler against Waller, which is still in force, and not impeached or reversed.

Waller having brought a suit against Bigler on the bond in the Supreme Court of the state of New York, the court had jurisdiction of the parties and of the subject-matter, so that that adjudication referred to is conclusive and binding upon the parties until reversed. The subject-matter of this point "*transit in rem judicatam*" (11 *Pet.* 100 ; 18 *Johns.*, 433 ; *Broom, Com.*, 369 *et seq.*).

A judgment record of a sister state, duly authenticated, is conclusive (*Dobson v. Pearce*, 12 *N. Y.*, 126 ; 1 *Abb. Pr.*, 97 ; 1 *Duer*, 142 ; *Constitution U. S.*, art. 4, § 1 ; *Acts of Congress*, May 26, 1790, and March 27, 1804).

Second. The United States commissioner found that Waller was liable for twenty-five thousand dollars waste done to the reality.

I. Waller was liable for this waste, for he was in possession of the estate when the waste was committed.

II. If Waller was in either actual or constructive possession he would be equally liable whether the waste was committed by himself, by his lessees, or by strangers.

III. The plaintiff claims that Waller was in actual or constructive possession, from April, 1862, until June, 1865, as a disseisor, and that during that period twenty-five thousand dollars waste (and much more) was committed on the estate by the rebels, who were Waller's lessees at the time.

Colonel Duke, an officer of the Confederate army,

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burned two mills and the wharf, worth thirty-two thousand dollars, May 2, 1862, and injured the houses.

The question of "adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is a question of law" (5 *Pet.*, 402).

Waller has no equity to say that he is not responsible for the acts of the rebels, for he voluntarily assumed the responsibilities of a disseisor, so far as the plaintiff is concerned, by the unlawful manner in which he (Waller) got possession, and also by his voluntary aid to the rebels, and his voluntary lease to them of portions of the premises.

The facts upon which the plaintiff relies, to show Waller's possession at the time of the waste, are taken from Waller's testimony, and may be supposed, from its unvarnished character, to be strained to the last degree of intendment, exculpatory of himself.

The defendant Waller admits substantially the following facts :

(a). Waller caused a void sale of the estate under the mortgage deed, April 1, 1862, and that, too, when it was impossible for Bigler to protect it.

(b). Waller attended said sale on the premises, and guarded by rebel forces, purchased an estate worth one hundred and eighty thousand dollars for seventeen thousand dollars Confederate money.

(c). Waller took a deed of the estate from the trustee, and paid the balance of the purchase money, some two thousand dollars Confederate money.

(d). Waller found the rebel authorities in possession of the estate at the time of his purchase.

(e). Waller claimed and received two thousand dollars in reality, four thousand five hundred dollars—of the rebel authorities, for the occupation of the estate, in 1863 or 1864.

(f). Waller sold or made an agreement to sell the estate in Richmond during the war.

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(g). Waller disposed of personal property on, and belonging to the estate, in 1863 or 1864.

(h). Waller contracted to have the mill removed to Richmond for sale, during the war, to enable the spy Knapp to have the appearance of a legitimate business while betraying the movements of the Federal army.

(i). Waller has always claimed to own the estate since the pretended purchase, especially to Bigler in 1865.

(j). The tenants whom Bigler found in possession of the estate in 1865 claimed to hold under Waller, and refused to attorn to plaintiff.

(k). Waller performed all the acts of ownership or possession possible, under the circumstances at that time, to show that he claimed to be the owner of the property.

(l). Waller purchased and entered April 1, 1862, and took the esplees till June, 1865. Therefore he was an actual disseisor of the plaintiff's estate during that period, he having "entered without right, under claim and color of title, and took the esplees."

Bigler elects to consider himself disseised by Waller during the period from April 1, 1862, until June, 1865 (4 *Kent*, § 482, *et seq.*; *Id.*, p. 83, 11 Ed.; 2 *Wash. R. Prop.*, 484, 286; *Melvin v. P. K. &c.*, 5 *Met.*, 15, 32; *Commings v. Id.*, 21 *Conn.*, 413; 12 *Johns.*, 118; 18 *Id.*, 355; and cases cited *Crabb R. P.*, 1006; 16 *Mo.*, 273; 8 *N. H.*, 52, *et seq.*).

Said the court in a late case:

"But almost any interference with the possession of land in derogation of the rights of the owner, may, if he (owner) so choose, be considered as a disseisin. . . . The elements of actual disseisin are, entering and intending to usurp possession; yet we have seen that one may become a disseisor, though entering peaceably under a void deed."

In *Pawlet v. Clark* (4 *Pet.*, 507), "it is distinctly intimated that a possession may be adverse whenever an

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ouster may be presumed ; and also uunanimously ruled that it may be adverse and maintain a bar under the statute, even where ouster is in terms repelled and not to be presumed from the very circumstances of the case. The court says a vendee in fee derives his title from the vendor, but his title, though, is adverse to that of the vendor" (7 *Wheat.*, 535).

"If this be the correct doctrine of the court—and there can be no doubt of it—it seems to follow that wherever the proof is that one in possession holds for himself to the exclusion of all others, the possession must be adverse to all others" (5 *Pet.*, 439).

"Where one having no title conveys to a third person, who enters under the conveyance, the law holds him to be a disseisor. . . ."

"The common law attaches to the disseisin a variety of legal rights and incidents" (Bradstreet v. Huntington, 5 *Pet.*, 402 ; Spencer & Storrs, *arguendo*, 429).

"An entry on the land of another, made under claim or color of right, is an ouster" (11 *Pet.*, 41, 52).

"So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, &c., such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held ; and the continued claim of property has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim" (2 *Smith Lead Cas.* 642, m. 566, Sixth Am. Ed.).

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“If a stranger is in possession, under or acknowledging the title of the devisee, or remainder man, it is equivalent to an actual entry” (4 *Met.* 67).

“A conveyance of wild and vacant lands gives a constructive seisin thereof in deed to the grantee, and attaches to him all the legal remedies incident to the estate.”

“An entry into a parcel in the name of the whole will inure as an entry into the vacant parcel; under a conveyance taking effect under the statute of uses the bargainee has a complete seisin without actual entry of seisin” (Green v. Litter, 8 *Cranch.* 250).

Said Lord MANSFIELD, in *Taylor v. Horde* (1 *Burr.* 110–112), “The consequences of actual disseisin, considered as such, continue law to this day.”

“Though our property is allodial, yet feudal tenures, by which this peculiar effect of a disseisin is produced, may be said to exist among us, in their consequences and the qualities which they originally imparted to estates” (*supra*).

“By exercising acts of ownership under the title of the disseisor, the disseisor becomes a disseisor by color of title” (3 *Watts*, 71).

“Disseisors can not qualify their own wrong by alleging that they have entered claiming a less estate than a fee. A party entering upon land under color of title is presumed to enter and occupy according to his title” (11 *Foster*, 41, 54).

“If one enters under a void grant he is a disseisor” (5 *Met.* 33).

“An entry and possession by a party under a claim of title in himself by virtue of a void grant, whether by parol or otherwise, is not less adverse than if possession were taken and held without any color of title whatever” (21 *Conn.* 413).

“If seisin of a party is proved, the legal presumption is that such seisin continues, and the burden remains on him who alleges a disseisin, even after he has

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given *prima facie* evidence of such disseisin" (5 *Met.* 173, *caption*).

"Neither actual occupation, cultivation, nor residence are necessary when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim" (*Wash. R. Prop.* p. 495, § 32; ed. 1862).

"In a disseisin under color of title the disseisin goes to the boundaries of the title" (15 *Geo.* 545).

"A deed duly executed, delivered, and recorded, will, it is believed, in all the States, actually pass the seisin of the grantor of the estate thereby conveyed, without any formal entry, either by force of the express provisions of statutes or of the doctrine of uses" (2 *Smith Lead. Cas.*, 5th Am. ed. 561).

Wherefore the plaintiff claims that the defendant was an actual disseisor of this estate in April, 1862, and much more that he was a disseisor at plaintiff's election.

In defense of these acts Waller claims to have been acting in our interest—for us, in fact, as our agent; at the same time he claims title to the estate under and by virtue of his purchase.

This agency we disavow, and it is unnecessary to go into an argument to show the absurdity of his acts compared with this claim of agency for us, since the law will not allow a man so to stultify himself as to claim that he is holding adversely and under his grantor at the same time (7 *Wheat.* 535, 548; 3 *N. H.* 27, 49; 18 *Johns.* 355; 13 *Id.* 118, 406).

The only difficulty which has arisen in cases raising the question of disseisin, is where the owner does not elect to consider himself disseised (*Shaw in Met.* 533; 11 *Pet.* 41; *Spence*, 487; 12 *N. H.* 1 or 9; 15 *Geo.* 545; 8 *Cow.* 601, 604).

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If the facts proved in evidence, and the law cited, maintain the proposition which I have enunciated, viz., that Waller by his acts disseised the plaintiff, at the time of the waste, then the argument is reduced to the question as to what are the liabilities of such a disseisor.

II. The plaintiff claims that Waller is liable for all the injury done to the estate by the defendants, by his lessees, or by strangers while he was in such possession.

This subject involves the doctrine of "constructive waste," as incident to disseisin. Much of the learning of disseisin is so obscured in the Year Books by the abbreviations of a dead language, and the poor typography of a foreign one, as to be difficult of access by the modern student. Lord MANSFIELD remarked in *Taylor v. Horde*, in regard to the learning of one branch of this subject of disseisin, that it "was once well known, but is not now to be found," . . . "and the more we read, unless we are very careful to distinguish, the more we shall be confounded." Yet in the same case he said, "The consequences of actual disseisin, considered as such, continue law to this day"—A. D. 1757 (1 *Burr.* 112).

To the same effect is 11 *Foster*, 41, 54 (*N. H.*).

Yet the reports of Assize abound with cases of this kind, some of which are cited in 11 *Coke, Rep. post*; while their frequency in the old books, and their rarity in the modern, may be ascribed both to the increasing respect for modern titles to real estate, and to the fact that now nearly all the cases for damage to the realty fall within the purview of some of the numerous statutes of waste.

The consequences of disseisin were fully discussed, the principles involved well settled, and the disseisor's liability recognized, by frequent adjudications of the courts in the earliest period of our judicial history.

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Owing to the rude and lawless character of British society before the eleventh century, and the frequency of this particular injury to the rights of tenants by men of great influence in the community, there seems to have grown out of the exigencies of the time and the equities of this class of cases, the common-law rule, that disseisors should be liable for "triple" the amount both of the mesne profits and the damage to the estate committed during their term. The state of society under which this rule of law originated, as well as the rule itself, is well set forth in the very interesting work of Mr. Reeves on the history of English law.

As to the form of the remedy for torts of this kind, the earliest seems to have been an action of trespass or a writ of entry; but after the time of Henry II. an assize, or assize of novel disseisin, was the common form of the action, until the statutes of waste were passed, when an action of waste or an action in the nature of waste, was the almost universal remedy. Says Mr. Reeves, vol. 1, page 242 (1 ed. quarto): "If judgment was given for the complainant the land was to be restored, with all its produce, received and to be received, from the disseisin to the time of judgment; and, as the sheriff was commanded to keep the land in peace till the assize was taken, the disseisee was to recover damages for any unjust abuse or misuse of the land in that interval. The disseisor was to suffer certain penalties. He was to be *in misericordia regis* in proportion to the nature of the disseisin; as, whether it was *cum armis* or without, so as the *misericordia* was never less than the damages; besides this, he suffered a penalty for the peace, if it had been violated. Again, if he had committed robbery with the disseisin, he suffered a treble penalty: the *misericordia* for the disseisin; for the peace, imprisonment; and for the robbery, as it is termed by Bracton, a heavy redemption. However, he did not lose life or limb, as

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the robbery was not prosecuted criminally. The disseisor, if he was the principal in the fact, was also to give to the sheriff on account of his disseisin, an ox and five shillings ['for the carcase of a pasturing ox, one shilling.' *Herb. Inns of Court*, p. 10]; but those who were only in aid, force, or counsel, in general, did not give this mulct to the sheriff, though in some counties they did. The disseisor was also to render damages, to be estimated by the oath of the jurors, and further, if need were, to be taxed by the justices if the jurors had been excessive; though the justices were not to estimate the damages at a larger sum than the jurors, unless it were a very clear thing that the jurors had taxed them much lower than was reasonable or proper (*Bracton*, p. 186, 187, b).

“ This liberty of increasing the damages was allowed to the judges, in order that disseisins might never escape the proper punishment of the law; for in those times of disorder and oppression there were many great men who would commit disseisins for the mere purpose of making the most of the fruits and profits during the time they could keep their unlawful possession, and when they had raised great sums thereby they could generally escape with a small *misericordia*, through the ill-placed lenity of jurors, who, when they by their verdict took from a disseisor the land, were unwilling to load him besides with heavy damages. For these reasons, it was expected that the justices should examine very carefully into the change that had been made on the land since the disseisin, either through the willfulness or neglect of the disseisor, or any other wise; all which he was to be compelled to make good, though much damage might have happened, by death of cattle and other accidents, which it was out of his power to govern; nor was any allowance to be made the wrong-doer for improvements.”

It is obvious from the above extract, which con-

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tains the law as known to the earliest writers (*Bracton*, p. 168, *et Britton*, ch. 42 and 44), what were the liabilities incident to disseisin at the common law.

But Lord COKE was of the opinion that the lessor had no remedy against his lessee for waste, prior to the Stat. of Marl., unless he had bound him by covenant not to do waste (2 *Inst.* 145). Therefore the Stat. of Marl., 52 H. 3, A. D. 1267, enacted that "fermors" should be liable for "full damage" and a "grievous amercement." Lord COKE, commenting upon the *non faciant* of this statute, says: "This prohibiteth that farmers, shall not do waste, and yet if they suffer a stranger to do waste they shall be charged with it, for it is presumed in law that the farmer may withstand it; *et qui non obstat obstare potest facere videtur*. In 1278 the Statute of Gloucester was passed, which enacted the old common-law liability of disseisors, viz., "triple damage" against "termors" for waste; and on this statute Lord COKE comments as follows "The tenant shall by construction of law answer for waste done by a stranger" (2 *Inst.* 303; 1 *Inst.* 43, 46).

Subsequent to the Stat. of Marl., five different statutes of waste were passed, including the 11 H. 6; 6 E. 1, c. 5, 13; 13 E. 1, c. 22 (2 *West*); 20 E. 1, c. 2; 9 H. 3, c. 4; giving "triple," "double," and actual damages against the holder of every possible species of an estate, except disseisors and trespassers, who were left to be mulct by the rule of the common law; and incident to the actions brought under these statutes was the doctrine of "constructive waste." During the thirteenth, fourteenth, and fifteenth centuries, English society became less turbulent, and nearly all of the actions for damage to the realty were included in some of the various statutes of waste, and we find the severity of a "triple" penalty relaxed to actual damages with costs, which were given to the successful party for the first time by Stat. of Marl. (*Reev.* vol. 2, p. 148, 2d ed.).

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The first case I find translated, which is exactly in point, is *Moore v. Hussy* (98 *Hob.* A. D. 1627), the material part of which, together with the valuable note of Justice WILLIAMS, I extract from the Boston ed. of 1829 :

“At the common law, and before the Statute of Gloucester, c. 1, if A were disseised by B, and B enfeoffed C, or were disseised by him, A had no remedy for damages against the feoffee or disseisor, but was to bring his assize against B, who was the immediate disseisor, and therein he was to recover the mesne profits by way of damage, not only for his own time, but also for the profits received by the feoffee or second disseisor.

“And likewise if A, the first disseisee, had re-entered, whereby he had lost his assize, he might by an action of trespass, *vi et armis*, brought against his disseisor, recover the mesne profits for all the mesne possessions ; but neither at the common law, nor now, can he recover upon his re-entry damages against the feoffee, lessee or second disseisor by action of trespass *vi et armis* ; for that fits not his case, as to them who did no immediate trespass.”

The doctrine of the text is supported by the following authorities: *Spelman v. Pole*, 34 *H.* 6, 35 ; *Kingsmail, Frowick, and others*, 13 *H.* 7, 15, 16 ; *Liford's Case*, 11 *Coke, R.* 51 ; *Symons v. Symons*, *Hetl.* 66 ; *Bro. Abr. Trespass*, pl. 35 ; *Bac. Abb. Trespass*, G. 2 ; 1 *Wood's Conv.* 108 ; *Keil, Pl.* 2 ; *Vin. Abr. Trespass*, R. 4, pl. 2, 5 ; *Case v. Degoes*, 3 *Caines*, 261 ; *Fletcher v. McFarlane*, 12 *Mass.* 46 ; *Emerson v. Tompkins*, 2 *Pick.* 491 ; *Stearns on R. Act, in notis*, 419).

Says the learned author of these notes: “Those who hold that the disseisee may maintain an action of trespass against the alienee of the first disseisor, or against a second disseisor, found their opinion, first, on a legal fiction, that by the re-entry of the disseisee he is remitted to his original possession, and is as if he had never

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been out of possession, and then all who occupied in the meantime, by what title soever they came in, shall be answerable to him in trespass for the profits during their own time; and secondly, upon a liberal construction of the Statute of Gloucester, c. 1, which provided that in an assize of novel disseisin the tenant should be liable to the disseisee for damages if the disseisor was unable to satisfy them.

“To this it is answered that a legal fiction ought never to be perverted to make an act which was lawful when done, a trespass by relation *ex post facto*, because *in fictione juris semper equitas existit*; and, secondly, that the Statute of Gloucester was limited in its operation to certain specified cases of possessory and ancestral writs, of which trespass is not one, and therefore is left as at common law; and by the common law the disseisor alone was liable to damage, though the land might be recovered against his alienee. Again, the action of trespass *vi et armis*, as suggested in the text, fits not the case of the disseisee as to the alienee of the disseisor or as to his disseisor who did no immediate trespass to the original disseisee. This action is the appropriate remedy for an injury to the possession only. A mere title, however valid, or a mere right of entry or possession, however perfect, is not sufficient; so strictly true is this position, that the disseisee can not maintain the action even against his immediate disseisor for any act done by him after the disseisin and during the continuance of his possession. Even after his restoration to the possession, it is only by the legal fiction of a *remitter*, a kind of *jus postlimini*, that he is enabled to maintain the action against the tortfeasor himself. The disseisor, while in possession, is seized of an estate in fee, an estate recognized by law, an estate sufficient to satisfy the covenants in his deed of lawful seisin, and of good right to convey (*vide* Pincombe v. Rudge, *in notis*).

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“His alienee therefore comes into possession by legal title, which, though not indefeasible, is so far valid as to protect him from being a trespasser by his entry. He enters under the authority of a person having title and in actual possession. He does not therefore violate the possession of any one; in other words, he does not commit a trespass against any one.

“Can the alienee, then, be made a trespasser *ab initio* by a fiction of law, without any unlawful act of his own, by the subsequent entry of the disseisee? The general rule of law is that a trespass must be an injury at the time when the act is done, and that an injury that has been derived from an act which was in the first instance lawful can not be a trespass. The exception to the rule is that whenever the person who at first acted with propriety under an authority or license given by law, afterwards abuses that authority or license, he becomes a trespasser *ab initio*. This exception does not apply to the alienee of the disseisor, who enters and retains his possession by title. His case, therefore, comes within the general rule; and it would seem, therefore, that, upon legal principles, he is not liable in trespass to the disseisee either before or after his re-entry.

“It may be said that this doctrine does not apply to a second disseisor because his original entry is tortious; that he enters without title or color of right, and is therefore liable in trespass as a tortfeasor to the first disseisee. But this reasoning is by no means satisfactory. As trespass is the appropriate remedy for an injury to the possession only, the action must be brought by him whose possession is disturbed, that is, by the first disseisor. The first disseisin, by his disseisin of the owner, becomes seised of an estate of inheritance which, though defeasible by the disseisee, is a good and valid estate as to all who are strangers to the title. The trespass, therefore, which the second disseisor commits by enter-

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ing upon the possession of the first disseisor, is a trespass against the latter, and not against the original disseisee; accordingly it is well settled that the first disseisor may maintain his action against his disseisor, and, if the original disseisee may also maintain the action, then the trespasser will be doubly punished for the same trespass" (Paramour v. Yardly, *Plowd.* 546).

The case of 2 *Pick.* (473), may be explained by making a distinction between the heir of the disseisor and a purchaser. As to the value of this authority (Hobart), Lord KENYON, in 6 *Durn. & E.* (441), alluded to it as "his most excellent vol. of reports." The case of Richard Liford (11 *Coke*, 51) is to the point, and the best decision in the old reports on this subject.

"(b.) If one disseises me, and during the disseisin he cuts down the trees, or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him *vi et armis* for the trees, grass, corn, &c.; for after my regress the law as to the disseisor and his servants supposes the freehold always continued in me. But if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, &c., and afterwards I re-enter, I shall not have trespass *vi et armis* against those who come in by title; for this fiction of the law that the freehold always continued in me shall not have relation to make him who comes in by title a wrong-doer *vi et armis*; for, *in fictio juris semper equitas existit.*" H. 7 *Hill*, term 11, year b. pt. 11; 19 *H.* 6, 28, b.; 34 *H.* 6 d.; 33 *H.* 6; 39 *El. B. R.* *Holcombe v. Rawlins*, 2 *E.* 4, are not to the contrary; they only hold that the lessee is liable, &c.

But in such case I shall recover all the mesne profits against my disseisor, in the same manner as the disseisee in such cases should recover in an assize at the common law before the Statute of Gloucester, c. 1,

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damages only against the disseisor; also it is to be presumed that the feoffee has given consideration or recompense to the disseisor, and that the lessee has paid rent to him or other consideration, and therefore in reason the disseisor is to be charged with the whole (2 *Roll.* 554; *Owen* 112; *Cr. EL.* 540). The same law if my disseisor is disseised, and afterward I re-enter I shall not have an action of trespass against the second disseisor, because the said fiction of law as to action extends only to my disseisor; and if I should punish the second disseisor he would be twice charged; and therefore I shall recover all the mesne profits against my disseisor, his servants and others, who have committed the trespass by his commands and his right; and so has the law been often taken upon consideration of all the books" (Peter de Vanlore's case, 9 *E.* 3, 2, a. b.; 10 *H.* 6, 14; 19 *H.* 6, 27; 22 *H.* 6, 21; 32 *H.* 6, 32; 33 *H.* 6, 46; 34 *H.* 6, 30; 37 *H.* 6, 35; 38 *H.* 6, 28; 2 *E.* 4, 18; 9 *E.* 4 39; 11 *E.* 4, 4; 20 *E.* 4, 18; 21 *E.* 4, 5, 74; 22 *E.* 4, 31; 6 *H.* 7, 9; 10 *H.* 7 27; 12 *H.* 7, 25; 13 *H.* 7, 15 b.; 1 *Wash. Real Prop.* 2nd ed. 105, 117, § 35; *Chipman v. Eminice*, 3 *Cal.* 283).

The modern case which discusses this question is *White v. Wagner* (4 *H. & J.* 373).

This cause was considered with great learning and research, both *arguendo* and by the court which consisted of BUCHANON, EARLE, JOHNSON, and MARTIN; and JOHNSON who gave the opinion says: "It is novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss or for injuries done to it, which the possessor could not restrain. The common carrier, the sheriff, and others are responsible for losses which they could not prevent.

"As the property of the landlord is placed in the

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tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it when committed, as in most cases it would be impossible for the landlord to ascertain in time, or come at the wrong-doer, it appears to have been the policy of the law to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God, or the king's enemies."

The above case establishes clearly the "liability of the lessee for all injuries amounting to waste done to the premises during his term, by whomsoever these injuries may have been committed, except acts of God and the king's enemies."

We have thus traced the history of this rule of the common law from the earliest times to its full recognition by the American courts (*White v. Wagner, ante*), and in concluding this point, may add that this principle of law is founded upon the soundest reason; for deplorable indeed would be the condition of owners of real estate if such were not the law. This liability is the only security they have against collusion with strangers to commit waste. The owner is presumed to be absent from the premises, and not to know who committed the waste. If the person in wrongful possession is not liable, he will have small inducement to prevent it or incur the trouble and expense of a lawsuit to recover damages forthwith. This reason applies with special force to this particular case. Waller could have recovered damages for the waste from the rebel authorities, which from the circumstances, was and is impossible for Bigler to do. The proof which was easy for, and not denied to Waller, it is impossible for us to obtain. Waller's meddling with the estate was an attempt at the grossest fraud on Bigler, and his liability as a disseisor for his acts is clear and well defined by the law of Virginia (*Tate's Dig. Va.* 518, ed. 1823; *Henning Stat. Va.*, vol. 2, 563; *Va. Stat. at*

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Large, vol. 1, *N. S.*, p. 193, 1682-3; *Va. Code*, 1849, *Tit. Waste*; *Va. Code*, 1860, *Tit. Waste*; 6 *Rand. R.* 8, 18).

The law of Virginia in this respect does not differ from the common law.

The reason of the law applies in this particular case with greater force than in any one which has fallen under my observation; and there is no equity which can relieve Waller, for he does not come into court with clean hands. It is an evidence that the questions raised by this point have been adjudicated in the said action in New York, where it was found that Waller was an actual disseisor and liable for the waste committed during this period, which we submit is *conclusive* in this action.

If it is urged that this may have been law once, but is not now, we reply in the language of FORTESCUE (408): "For there are many things that have never been altered, and are law now."

III. The United States Commissioner found fifteen thousand dollars rent for three years' possession.

This finding assumes the three following propositions, viz.:

- (1.) Waller's possession during that period.
- (2.) His liability for rent.
- (3.) The value of the rent, fifteen thousand dollars.

1. The question of Waller's possession has been argued (*ante*).

2. If Waller was in possession of the estate, he is liable for the full value of the rent at the time he took possession (April 1, 1862), nor can he be heard to say that waste committed by himself, or by his lessees, or by strangers during his possession, should lessen the amount of the rent for which he is liable.

(a). Since it would be taking advantage of his own wrong, which is contrary to a maxim.

(b). It is clearly settled that waste by a stranger

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will not excuse a lessee from the payment of rent, and it would be strange if a wrong-doer could be in a better position in this respect than a lessee under the ordinary covenants.

(c). The defendant can not plead that this estate was neutral ground at the time of his possession, and so very dangerous as to be of no value, since the waste for which he is liable (the destruction of the wharf and mill), was the cause of its being abandoned territory or neutral ground. Had the dock and mill remained, it would have been a strategic point, and occupied by either army to the advantage of the owner.

3. The value of the rent is estimated by Smith at seven thousand dollars per annum. Bigler estimates it at the same, and Southard at from five thousand dollars to ten thousand dollars per annum. There is not a scintilla of evidence in the case to show that this estimate was not the minimum rental value of the estate when Waller took possession and before the waste was committed (*Paradine v. Jayne*, *Aleyn*, 26, 27; *Pollard v. Shaffer*, 1 *Dall.* 210; 1 *Chan. Cas.* 72; 1 *Chan. Cas.* 84).

“If a man receives my rent, it is at my election if I will charge him with a disseisin by bringing an assize” (*Vin. Abr. Disseisin*; *P.* 15 *Ja. B.*; *Hilliard Rem. for Torts*, 104).

Waller received rent for the estate in the above period two thousand dollars from the C. S. A., and is liable for full rent to plaintiff whether he collected it or not (8 *T. R. K. B.* 267; *P.* 39; *Geo.* 3; *Perk.* § 738; 1 *Co.* 98, a; 1 *Ro.* 236; *Shyl.* 162; *Plowd.* 29; 1 *Ro.* 519, 939; *Syderf.* 266, 447; *Shyl.* 431; *Id.* 48).

It is in evidence that Waller's liability for rent during this period has been adjudged in said case in New York: “And when a point that has been decided on the merits in a suit at law is again brought in question on the same ground in equity, it is *res adjudicata*”

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(Kingsland v. Spalding, 3 *Barb. Chan.* 143; 1 *Johns.* 96; 1 *English*, 317).

IV. Plaintiff seeks to recover against Waller, the value of the personal property taken from the estate while it was in Waller's possession. Bigler swears that this amount is ten thousand dollars, which not being denied by Waller, is taken for confessed.

If it is claimed that the rebel authorities were public enemies in such a sense as to constitute an exception to a disseisor's common-law liability or excuse his torts done by their authority, it may be answered on the authority of *Tautong v. Hubbard*, 3 *Bos. & Pull.* (302), approved in *Exposito v. Bowden*, 4 *E. & B.* (978), that a stranger can not plead the act of his own government as an excuse for the breach of his own contract, because it would be taking advantage of his own wrong; *a fortiori*, neither can Waller plead to his liability for constructive waste, that the rebel authorities (his government) committed the waste. There is a decision in the Year Books, 33 *Hen.* 6, p. 6, that such public enemies must not be "traitorous subjects of the king." But they were not public enemies (*vide*, Justice CHASE, Raleigh, N. C., decision, *Shortridge & Co. v. Macon*).

V. It is urged that equity will relieve the rigor of the common law in this particular of "constructive waste." To that argument it may be answered: "If the law has determined a matter with all its circumstances, equity can not intermeddle" (*Willard's Eq.* 39).

"The assertion that chancery will decree against the general rule of law, and relieve against every mischief which happens, contrary to natural justice, is not founded in principle or supported by authority" (*Id.* 39).

"And it is said in Rook's case (5 *R.* 99, b.), that discretion is a science not to act arbitrarily, according to men's wills and private affection; so the discretion

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which is executed here is to be governed by rules of law and equity which are not to oppose, but each in his turn to be subservient to the other'' (*Id.* 41).

“A court of equity has no power to relieve against a general rule of law, nor to abate the rigor of the common law, nor to afford relief in cases against natural justice, in every case, for many such exist without any redress, legal or equitable’’ (*Id.* 41).

“Equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy can not be had in the courts of common law’’ (*Id.* 41).

“The jurisdiction of equity is assistant, concurrent, and exclusive’’ (*Id.* 41).

“A court of equity can in no case relieve against a positive act of the Legislature or an established rule of the common law’’ (*Id.* 48).

“When a court of chancery has once gained possession of the cause, if it can determine the whole matter it can not be the handmaid of other courts nor beget a suit to be ended elsewhere’’ (*Id.* 41).

VI. The report of the commissioner should be confirmed, and judgment entered against William Waller in favor of the plaintiff for the sum of twenty-six thousand one hundred and eighty-six dollars, with interest from April 3d, 1865, and costs; and a decree entered that defendants Waller and Saunders execute a release deed to James Bigler of all claim to said Rippon Hall estate, and Bigler's bond be delivered up and canceled.

J. Alfred Jones, for respondent.

CHASE, Ch. J.—The general principles on which this case must be adjudicated were announced at the last term. But a suit commenced by the defendant (Waller), in a state court of New York against the plaintiff (Bigler), prior to the bringing of the present suit in this

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court was then pending and undetermined, and we did not think proper until that suit should be disposed of to proceed to final decree here.

That suit, however, has been terminated by discontinuance, and there is no reason why a final disposition of the litigation should not now be made.

The principles stated at the last term require that all the exceptions taken to the report of Commissioner Chahoon be sustained, except so far as the views now to be stated may affect this general order.

It is not denied that on May 10, 1860, the sum of thirteen thousand dollars was due from the plaintiff (Bigler) to the defendant (Waller), as a balance of the purchase money agreed to be paid for the estate sold to the former by the latter.

The questions to be considered are these :

1. By what rule shall interest be computed on this balance? In other words, shall interest be allowed for the period during which intercourse between the parties, and between the parts of the country in which they respectively lived was suspended by the civil war?

In a case decided by the Circuit Court of the United States for the District of North Carolina, it was held that interest did not cease during the recent civil war, in consequence of the residence of the parties to the contract in the hostile sections of the country. Since that decision was made it has been held by the Supreme Court of the United States, in the case *Hanger v. Abbott* (6 *Wall.* 532), that the statute of limitations was suspended by the civil war in the insurgent states as to non-residents, having causes of action against residents of those states. And in the case of *Ward v. Smith* (7 *Wall.* 452), while it was held that under the circumstances of that particular case interest did not cease, the opinion of the court was put upon circumstances creating an exception to the general rule that interest

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does not accrue during war between citizens or subjects of belligerent states. The general rule was neither affirmed nor denied; but it may not unreasonably be inferred from the language of the court, that if the direct question presented by this case were before that tribunal, it would be resolved in favor of the maker of the bond. Bigler, the maker, was in occupation of the estate purchased at the commencement of the war by his agent; and not only was he wholly excluded from occupancy and from possession during its continuance, but the improvements put on the property by him at great cost were destroyed, and the state otherwise was greatly injured. Waller, the obligee, was in the Confederate army, and at a sale made under the trust deed executed by Bigler to secure the bond became himself the purchaser; and he was doubtless, though since the war he has disclaimed title to the land as against Bigler, entitled as such purchaser to the possession.

We have already said that Waller is not to be held responsible for the injuries sustained by Bigler in consequence of the war; but, on the other hand, we can not doubt that if interest on a debt should cease in any case it should cease in this; and our duty is to determine this question as we believe it would be determined by the Supreme Court if submitted to its consideration.

It is more difficult to determine the period during which interest should cease. The actual beginning of war against the United States, doubtless, preceded the proclamation of the president of April 15, 1861, calling out the militia to suppress insurrection; but the proclamation declaring the blockade of the ports of the insurgent states must be regarded at the first formal recognition of the existence of civil war by the National Government.

That proclamation was issued on April 19, 1861, and that date, therefore, must be taken as the date of the

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commencement of the war. The period of its termination has not been so definitely ascertained.

It was declared by the concurrent action of the President and of Congress to have ended on August 2, 1866, and this date has been recognized by the Supreme Court as the end of the rebellion, intended by the abandoned and captured property act and some other legislative provisions. In another case depending on the effect of the statute of limitations the court thought fit to decline fixing any precise date of termination applicable to all cases.

This question being thus left open, we think it right in this case, to take the establishment at Richmond of the adhering government of Virginia as the recognized government of the whole state as the end of the war in this state. This event may be said to have taken place when the executive department of that government was removed from Alexandria to Richmond, on May 26, 1865. The period, then, to be excluded in the computation of interest is the time from April 19, 1861, to May 26, 1865.

2. What credit, if any, is to be given to Bigler for money received by Waller from the Confederate Government?

The evidence shows that the sum of two thousand dollars, was thus received in October, 1863, by way of compensation for use made of the property and of indemnity for waste committed upon it. At that time it appears that the rate of Confederate notes for gold was thirteen for one. For this sum of two thousand dollars, reduced to the specie equivalent, with interest on the sum thus ascertained, credit is to be given on the bond.

3. What credit, if any, should be given to Bigler for damage sustained by reason of non-fulfillment on the part of Waller of his contract to release to purchasers? It is clear enough upon the evidence that under the origi-

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nal contract of purchase, Bigler had a right to sell portions of the estate, and to have these portions released to the purchaser on payment to Waller of so much of the purchase money as would leave his security unimpaired. And it is sufficiently proved that some time after the purchase, in 1853 or 1854, Bigler had some offers to buy small parcels of the tract, and applied orally to Waller for a release; and that Waller, for some reason, refused. But it does not appear that Bigler at that time, or at any time afterwards, until this controversy arose, set up any claim for damages. On the contrary, Bigler continued to make payments on account of the purchase until May, 1860. Under these circumstances it would be difficult to sustain the claim for damages were the proof of the quantity of land sold, the price offered, and the demand for release under the contract much clearer and more specific than it is. But on all these points the evidence is vague and indefinite—much too vague and indefinite to form the basis of a decree. We are obliged, therefore, to deny any credit on account of damages. A decree may be entered in conformity with these principles.

Statement of the Case.

DISTRICT OF VIRGINIA.

REID *et al.* v. KERFOOT & McCORMICK.

A suit being in progress in a state court for the settlement of an estate, two of the legatees being non-resident, but having knowledge of this suit, and having been made parties by order of publication, file their bill in the United States Circuit Court to have the estate administered. *Held*, the latter court has no jurisdiction.

Statement of the Case.

Alfred Reid and wife, citizens of New Orleans, and J. A. Lowers, a citizen of Havana, Cuba, filed their bill in the Circuit Court of the United States for the District of Virginia, alleging that Franklin J. Kerfoot and Province McCormick, who had been left executors of the will of William Lowers, had wasted the assets in various ways specified in the bill, and praying that they might be decreed to account.

They also averred that they were legatees under the will. The executors answered, making defense to the charges of devastavit, and at the same time pleaded that a suit was at the time pending in the Circuit Court of the State of Virginia for Clarke county, for the settlement of the estate to which all persons interested were parties, the plaintiffs having been made so by an order of publication under the laws of the state; and showing that the plaintiffs had personal knowledge that the aforesaid suit was, at the time they filed their bill in this court, pending. That the plaintiffs could obtain all the relief they were entitled to in that cause. They, therefore, prayed that the plaintiffs' bill might be dis-

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missed for want of jurisdiction in this court, the state court having previously taken jurisdiction of the subject.

H. G. Pond and *H. H. Wells*, for the complainants.—Reid and wife are citizens of Louisiana, all of the defendants excepting—are citizens of Virginia. William Lowers died on December 30, 1852, seized of an estate, real and personal, valued at seventy-five thousand dollars, which by will he bequeathed in certain proportions to his wife for her life and to his children, ten in all.

An objection is made that this court has no jurisdiction of this cause, because of the pendency of a suit in the Circuit Court of Clarke county, for the probate of this will and for its establishment, or in their own language a “suit to set up the will, to have it admitted to probate in the proper forms and qualify as executors.” It is said that personal service was made upon the legatees resident of Virginia, and by order of publication against absent defendants. The executors in this bill also ask that all accounts necessary or proper, or asked, or required by the parties, might be taken.

We reply that the pendency of that suit is not a bar to this one, nor does it in any wise interfere with the rights which the complainants as citizens of another state have to prosecute their actions in the Federal Courts.

In *Buck v. Colbath* (3 *Wall.* 335), the history and growth of the Federal jurisdiction is traced—at page 341, the general ground on which most of the cases rest, is defined, to wit, “when property has been seized by an officer of the court, on its process, the property is to be considered in the custody of the court, and no other court can interfere with it.” But it is only when the property is in the possession of the court, that the court is bound to protect it against the process of other

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courts ; whenever the litigation is ended, other courts are at liberty to deal with it according to the rights of the parties.

From this case, and the principles involved, it was said that the court first obtaining jurisdiction had a right to decide every issue arising in the progress of the case.

It is undoubtedly upon this last proposition that the defendants alone can undertake to obtain their objections to the jurisdiction. The cause, however, is subject to a very necessary as well as just limitation, and is pointed out by the Supreme Court at page 345. It is to be confined to the parties upon the court, or who may, if they wish, come before it and have a hearing on the issue to be decided.

It is not true that a court having jurisdiction of the subject-matter and of the parties, thereby excludes all other courts from adjudicating upon other matters, having a very close connection with those before the first court, and in some instances requiring a decision of the same questions exactly, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties ; see pages 345, 346. Applying these principles to this case, we ask, is the relief sought the same ?

The bill in the state court was a bill simply for probate of a will. This is a proceeding to charge the defendants with property received by them, and disposed of illegally before any probate of the will was had. It seeks to charge them personally for a wrongful conversion and misappropriation of the property of the complainants. Is it not clear that the remedy and the relief sought is not only not the same, but if these complainants had made themselves parties to the suit now pending in the state court, they could not in that suit have the relief prayed in that bill.

It is doubtful whether the proceeding in the state

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court can be said to be a suit at all or not ; it is rather an ancillary proceeding, and is like that in the case of *Shipley v. Bacon* (10 *Howard*, 56). In that case the complainant filed his bill against Bacon and others assignees of the bank of the United States, alleging himself to be a creditor and a judgment was shown, recovered in the District Court for the city of Philadelphia, that upon application the creditors had failed to pay his claims. He then filed his bill in the Circuit Court of the United States. The defendant pleaded to the jurisdiction of the Federal courts, averring the pendency of the suit in the Pennsylvania courts, and that they had ample power to enforce the trusts in regard to the rights of the complainants.

The Supreme Court states the question to be, "Can the proceedings stated in the plea be considered to be a suit?" The Pennsylvania act required the assignment to be recorded in thirty days, schedules and sworn inventories of the property to be filed. It is made the duty of the court there to appoint appraisers, and then the assignees shall return an inventory and appraisement, and to give bonds to the commonwealth that they will faithfully execute the trust. It was then made the duty of the court on application of any person interested, to issue a citation to the trustees to appear and exhibit their accounts, and the condition of the trust.

The court was authorized also to require parties to come in, and to make service by publication. The court says, "If the plea in this case had been perfect, it would not follow that the complainant could not invoke the jurisdiction of the Federal courts. He being a non-resident has his option to bring his case in the Circuit Court of the United States, unless he has submitted to, or been made a party to the special jurisdiction."

To establish his claim the complainant has the right to sue in the Circuit Court which was established

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chiefly for the benefit of non-residents, not that the claim should be established on any novel principles of law or equity, but that his rights might be investigated free from any supposed local prejudice or any unconstitutional legislation.

On the most liberal constitution, favorable to the exercise of the special jurisdiction, the rights of the plaintiff in this respect could not, against his consent, be drawn into it.

The court held that the proceedings in Pennsylvania were not a suit in the sense that the word is used when we speak of the pendency of a suit being a bar to another action.

In what essential particular do the proceedings had in Clarke county, differ from those referred to in the case last cited. The complainants did not make themselves parties nor submit to the jurisdiction, nor did the order of publication have any such effect, because, by the 13th section of the act which authorized this publication (see Code 1860, page 708), it is expressly provided that no such decree shall be final against any such non-resident, until the expiration of five years after the same is entered. It enacts "that a defendant who was not served with personal process may within five years from the date, petition to have the case re-heard, and may plead, or answer, and have any injustice in the proceedings corrected."

Again the bill expressly charges that the acts of the defendant were fraudulent and collusive, and the Supreme Court in the case last cited say, "We suppose that it could not be contended that fraud or collusion might not be shown to avoid the proceedings before any tribunal having jurisdiction." Can it be doubted that this well recognized ground of equitable jurisdiction should be exercised in this cause? Could a stronger case of collusion be alleged than that set forth in this bill? The defendant legatees and executors have used

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the property, dealt with and treated it as their own, and divided it among themselves to the exclusion of the complainants ; could there possibly be a worse collusion than that of exercising a discretion given by the order of the court, and investing the property of this complainant in Confederate bonds, instead of Virginia state bonds ? The latter must be good, no matter what the result might be ; the value of the first depended upon the most remote contingencies. The final success of the Confederacy, and its power after success was achieved to redeem the untold millions of its paper promises, being doubtful, would any honest trustee, dealing fairly and without collusion, invest in the doubtful security when the opportunity was allowed to invest in one without doubt ? Even the court did not direct such an investment, but left the election to the executors ; can anyone doubt that there was a collusion to use the property of the complainants to sustain the failing Confederacy ?

All these questions of jurisdiction, however, have been fully considered and decided by this court in the case of *Miller v. Miller, The Bank of the Valley in Virginia*, and the causes so familiar to the court, as to make further argument unnecessary.

There is, however, one other consideration which is entirely conclusive both on principle and authority. It is this—The several acts of Congress providing for the removal of causes from the state to the Federal courts authorize this complainant to remove the cause from the Circuit Court of Clarke county to this court, on filing his application for the removal, the Circuit Court of the United States becomes at once, not only possessed of the whole case, but the state court is thereby perpetually inhibited from any further proceedings in it. Why then should this court compel parties to the circuitous method of dismissing this bill, then going to the state courts and removing the cause pending there to this tribunal ?

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Such a course would be too circuitous to be tolerated. The wiser and more reasonable course would be, not only to sustain this jurisdiction, but to hold that even if the court would not as an independent question have jurisdiction, that the acts authorizing removal, by their own vigor, vested the jurisdiction, provided only, that the citizenship of the parties is such as taking them within the general jurisdiction clauses of the acts of Congress, and such we understand was the decision of this court, the Chief Justice presiding in a cause determined at the May term, 1868.

In the case of *Riggs v. Johnson* (6 *Wall.* 169), decided at the December term, 1867, a very thorough and exhaustive review is found of the whole question of Federal jurisdiction, from which one great fact is plainly deducible, to wit:

That whenever the privilege is granted to the citizen to enforce any right in the Federal court, that court has the power by appropriate remedy, to give full, perfect and adequate relief. And that no state court can by any proceeding in any wise impair this right.

That even the perpetual injunction issued by such a tribunal is utterly powerless and affords no protection. Such is also the manifest spirit and general scope of the laws providing for removal of causes, and is clearly evidenced by the amendments made thereto from time to time.

The general principle that allows one court having jurisdiction of a cause to decide all questions that arise in it, stood as an insurmountable barrier against the right of a citizen of another state to litigate his causes in the Federal tribunals. But Congress stretches out its hands, in a further execution of the dormant powers of jurisdiction given by the constitution, seizes the whole cause, removes it and all the parties to the Federal court, and prohibits the parties from litigating their causes in any other tribunals.

Defendant's points.

We submit that this court has undoubted jurisdiction, and neither the answer, demurrer, or plea of the defendant, offer any valid objection or defense to the relief sought by the complainant.

Ould & Carrington, for the defendants.—This suit is not matured for a hearing. It is brought against the executors of William Gowers, deceased, and also against all the legatees of Gowers. Process has been executed only on the executors. The suit is at rules as to all the other defendants. These other defendants are necessary parties, and no step can be taken in the cause until they are before the court. We do not suppose that this point is one which admits of argument. The bill charges that the will devises valuable lands in which all these legatees are equally interested with the plaintiffs. The case of *Barney v. Baltimore City* (6 *Wall.* 280), is a case in point. In that case, the bill was dismissed, because all parties interested in partition of lands, which was sought by the plaintiffs, were not before the court.

But, on an inspection of the joint interest of these legatees on the lands, they are necessary parties. Their interest in the balances sought to be recovered of the executors makes them necessary parties (See *Story's Equity Pleading*, section 89, and cases there cited).

It is not alleged that these parties can not be brought before the court. On the contrary, the bill alleges their residence in Virginia. The plaintiffs are now proceeding to mature their case against these defendants, and have sued out subpoenas. Until they are executed, and the cause set for hearing at rules as to them, no proceeding in the cause can be had, and any further argument at this time seems to be premature.

We proceed with the argument, only because the plaintiff's counsel insist on now submitting the case, and we protest against any decree at this time.

Defendant's points.

We do not propose to argue the several other questions alluded to in the brief for the plaintiffs, but to confine ourselves to the question of jurisdiction alone. It seems to be a concession, that if this court entertains jurisdiction, it will decree an account. When that account is taken the other questions referred to will be considered. We maintain, that full and complete jurisdiction of all the matters set forth in the bill has been taken by the Circuit Court of Clarke county, that this jurisdiction has been taken as to all parties interested including the plaintiffs, that the jurisdiction of the Circuit Court of Clarke county was concurrent as to these matters with the jurisdiction of this court, and that it is exclusive from the fact that it first attached.

It will not be disputed that the Circuit Court of Clarke county has jurisdiction of the matter of settlement of the percentage of fiduciaries and the division of lands in which legatees are jointly interested. If any question arises on this point, it must be on the ground, first that the proceeding in Clarke county is not a suit, or secondly, that the plaintiffs are not parties to the suit.

The first ground is taken in the plaintiff's brief.

It is rather hinted at than plainly taken. The intimation thrown out is, that it was a proceeding instituted to establish the will, and not a suit for the settlement of the accounts and for a division.

The records very plainly show what the proceeding is. It is not a motion, but a regular suit in chancery. The executors are parties plaintiff, and all the legatees are parties defendant. All these defendants are regularly proceeded against, and brought before the court, and the cause set for hearing as to all. The court has taken jurisdiction of the matters in the bill as to plaintiffs, and as to all the defendants. The matters in that bill are as follows :

The plaintiffs in the bill in Clarke county Court,

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allege the death of Gowers, the existence of a last will at his death, the destruction of the instrument by fire, the fact that the plaintiffs were named as executors, that they had taken possession of the property and had partially administered it, and they pray that all the legatees be made parties, that the will be established, that their accounts be settled, and distribution made.

It is perfectly clear and indisputable that the court had jurisdiction of all these matters, and equally so that these matters might be put in suit by any party interested, by the executors as well as the legatees. So soon as the suit is brought, it is one which can not be dismissed without the consent of the defendants, and is one which will be proceeded in at their instance. Every account asked for in the suit in this court, and all relief here asked, can be had in the suit in Clarke county.

Then it seems that if the Court of Clarke county has not taken jurisdiction in full of all these matters, and as to all these parties, it must be because the plaintiffs, Reid and wife, and John A. Gowers are non-residents, have not been served with process, and are not parties to the suit. We maintain that they are parties to the suit in Clarke county.

They have been proceeded against by order of publication which has been duly executed. It is certainly true that this proceeding is sanctioned by the laws of Virginia. It is expressly provided by law, that in such case as this, parties interested may be proceeded against by publication, and when they have been so proceeded against, the court may proceed with the cause as though personal service of process had been made (*Code of Virginia*, p. 707). The provisions of the Code of Virginia, alluded to by plaintiff's counsel (Code, ch. 170, § 13), are enacted for the security or protection of the absent defendants. They do not go to the extent of impairing the judgment or decree, but simply provide

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for a re-hearing on cause shown within five years. It is not provided that the decree may not be executed in five years, but that on the application of the defendant it may be re-heard within four years.

The decree, however, is to be executed. It has all the form and effect of other decrees against home defendants. It carries with it the same lien. It may be enforced by the same writs of execution. It is final and conclusive until it is set aside. It can no more be said to be wanting in finality than any decree or judgment which is liable to be appealed from. There can be no question about this, for language of the law is (ch. 170, § 12, p. 708, of the Code): "When such order shall have been published and posted, if the defendants against whom it is entered, or the unknown parties, shall not appear within one month after such publication is completed, the case may be tried or heard as to them." Then it is certain, that so far as the laws of Virginia are concerned, these plaintiffs are now parties to the suit in Clarke county.

By what law is it to be determined whether they are properly before the court? It is a court organized under the laws of Virginia, and those laws must prescribe the mode of service of process. In some cases the same law makes delivery of process to a member of the family of the defendant equivalent to service of process on him. In other cases the officer may leave a copy of process at the place of business of the party. As to all this question of service of process, which must be to some extent arbitrary, the law of the state must govern. We do most earnestly contend that these plaintiffs are actually, and are properly and legally parties to the suit in Clarke county, Virginia, and that the jurisdiction fully attached as to them.

If the jurisdiction has attached, it is exclusive (See *Buck v. Colbath*, 3 *Wall.* 337; *Shipley v. Bacon*, 10 *How.* 56; and *Riggs v. Johnson County*, 6 *War.* 166).

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The last case is cited by plaintiff's counsel. In this the question of jurisdiction was raised and depended on the following facts :

Judgment had been obtained by Riggs against Johnson county in the Circuit Court of the United States, execution sued out and returned *nulla bona*. A mandamus was sued out against the supervisors of the county to compel the assessment of a tax sufficient to pay the amount of the judgment. Objection was made that a suit had been brought in a state court against the supervisors to enjoin the levy of any tax to pay the bonds on which the judgment of the United States Circuit Court had been rendered, and this injunction had been perpetuated. The Supreme Court decided that the jurisdiction of the Circuit Court of the United States attached when the original suit was brought on the bonds, that the jurisdiction was not exhausted by the rendition of judgment, but that it continued until the judgment was satisfied. That under this jurisdiction the Circuit Court of the United States could proceed to enforce payment of the judgment by any process, including the mandamus under consideration, and that the injunction from the state court, obtained as it was after the original suit in the United States Court was instituted, could not interfere with the jurisdiction of the United States Court which had thus previously attached.

The citation of this case is unfortunate for the plaintiffs, for if it proves anything, so far as this case is concerned, it proves that the court will inquire which jurisdiction first attached, and will give exclusive jurisdiction to that of older date.

3. We maintain that the jurisdiction of the Circuit Court of Clarke county is exclusive, on the additional ground that the proceedings in that court have become virtually and in fact proceedings *in rem*, and that the court through its officers has possession of the *res*. If

Defendant's points.

this be so, all the authorities concur in denouncing any interference with the jurisdiction. That it is so, the record abundantly shows. The will gives the executors full power to sell the lands and all other property. The will was established by the decree of May 17, 1866, and by the decree of May 18, 1866, a commissioner of the court was directed to settle from time to time the percentage of the executors. The executors sold the lands and reported the sale to the commissioner, and the commissioner proceeds to take charge of these proceeds and to decree their proper distribution. Again, the decree of October 19, 1866, directs the executors to collect and report the proceeds of these sales, and further decrees the sale of the Southern Bank notes on hand. This is exactly such possession of the *res* by the court as if it had appointed its commissioner to take the property and sell it. That such possession can not be divested by another court, see *Freeman v. Howe*, 24 *How.* 450; *Taylor v. Cornell*, 29 *Id.* 583; *Buck v. Colbath*, 3 *Wall.* 337. In the last case, at p. 345, the judge pronouncing the opinion of the court, is very full, and very decided, in announcing the principle. Note the fact, that he applies it to "parties before the court, or who may, if they wish to do so, come before the court, and have a hearing on the issue so to be decided." Even if these plaintiffs are not parties to the suit in Clarke county, they certainly may, if they wish to do so, come before that court.

We refer to 1 *Greenleaf on Evidence*, §§ 541 to 543 inclusive, and the cases there cited, for a full exposition of the law respecting the force and validity of judgments and decrees *in rem*. From these views we deduce the conclusion, that so far as the property involved in this suit is concerned, the jurisdiction of the court in Clarke county is fully attached, and that this jurisdiction is wholly independent of all questions of residence of the parties.

Defendant's points.

4. The plaintiff's counsel argues that Congress has given full privilege to the plaintiffs to remove the suit from the Circuit Court of Clarke county to this court. They ask then, Why put the plaintiffs to this circuitous remedy? Why not allow this suit to proceed, instead of forcing them to dismiss it, and then bring up the suit from the state court? We answer that it is against the first principles of the law to allow two suits to be progressing at the same time with the same object. To avoid this, Congress provided for the removal of such cases as it chose to have tried in the Federal Courts. Congress did not provide that a suit for the same matter might be brought in the Federal Court, when one was pending in the state court. It gives only the privilege of removal, defining the terms on which the removal is to be made. It is true that the constitution provides for the jurisdiction by the Federal Court of cases between citizens of different states. But it is equally true that the same constitution reorganizes the state tribunals, and respects their jurisdiction. Every principle for which we contend is consonant with the constitution, and presents no conflict with the right claimed by the plaintiffs. If the plaintiffs had brought their suit before the jurisdiction of the state court attached, no objection could have been urged. Congress provides for such cases by giving the right of removal. When this right is sought to be exercised, it must be prosecuted as the statute directs, and the plaintiffs must bring themselves within its ruling. If Congress, or the constitution had intended to ignore the right of the state courts to take jurisdiction of cases against residents of other states, there would have been a prohibition to such jurisdiction. On the contrary, such jurisdiction is actually recognized, by the provisions of the laws for the removal of causes, which put the party seeking their benefits under terms requiring them to come within certain conditions.

Opinion by CHASE, Ch. J.

For these reasons we respectfully contend that the bill of the plaintiffs should be dismissed. The facts on which we rely are fully set forth by the pleadings. Our defense is made in the demurrer which is filed with the answer, in the plea to the jurisdiction, and again in the answer, and the relief sought may properly be extended on the issue joined on any one of the three.

BY THE COURT.—CHASE, Ch. J., presiding.—The demurrer and plea are sustained, and the bill must be dismissed.

Statement of the Case.

DISTRICT OF VIRGINIA.

CÆSAR GRIFFIN'S CASE.

May Term, 1869.

The government established at Wheeling, Virginia, soon after the secession of the State of Virginia, having been recognized by the Executive and Legislative Departments of the National Government as the lawful government of Virginia, this recognition is conclusive upon the Judicial Department.

This government was in contemplation of law, the government of the whole state of Virginia, though excluded as the government of the United States itself was, from the greater portion of the territory of the state.

A construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference.

The prohibitory provisions of the fourteenth amendment to the Constitution of the United States, did not, instantly, on the day of its promulgation vacate all offices held by persons within the category of prohibition, and make all official acts performed by them since that day, null and void.

A person convicted by a jury, and sentenced in court by a judge *de facto*, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, can not be properly discharged upon *habeas corpus*.

G. a colored man is indicted and tried in the Circuit Court for Rockbridge county, Virginia, for shooting with intent to kill, convicted and sentenced to confinement in the penitentiary for two years. The court was presided over by a judge disqualified to hold office by the fourteenth amendment to the Constitution of the United States, but he had been in office two years before the amendment was adopted. G. applied to the United States Circuit Court for Virginia, to be discharged on *habeas corpus*. *Held*, he can not be discharged.

When the functionaries of the State Government, existing in Virginia

Statement of the Case.

at the commencement of the late civil war took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a government for the State of Virginia which could be recognized as such by the National Government.

It is clear that if the government instituted at Wheeling, was not the government of the whole State of Virginia, no new state has ever been constitutionally formed within her ancient boundaries, for the existence of the State of West Virginia depends on the consent of Virginia.

When the State Government, recognized by the United States, was transferred from Alexandria to Richmond, it became in fact what it was before in law, the government of the whole state; as such it was entitled under the constitution to the same recognition and respect in national relations as the government of any other state.

The ratification of the fourteenth amendment to the Constitution of the United States, was officially promulgated by secretary of state on July 28, 1868.

Persons in office by lawful appointment or election before the promulgation of this amendment, were not removed therefrom, by the direct and immediate effect of the prohibition to hold office contained in the third section.

Legislation by Congress was necessary to give effect to the prohibition by providing for such removal.

The exercise of their several functions by these officers until removed in pursuance of such legislation is not unlawful.

Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended.

The whole spirit of the Federal Constitution is against *ex post facto* laws, or bills of attainder in form of trials by jury, and denies to the legislature power to deprive any person of life, liberty, or property without due process of law.

A provision which at once without trial deprives a whole class of persons of offices held by them, for cause, however grave, is inconsistent with this spirit and general purpose, and therefore no such construction can be given the third clause of the fourteenth amendment.

In the judgment of some enlightened jurists, its legal effect was to remit all other punishment. Such was certainly its practical effect.

Statement of the Case.

Appeal from an order of the District Judge.

Cæsar Griffin, a negro, was indicted in the county Court of Rockbridge county, for an assault with intent to kill. He removed his case as under the law he had the right to do into the Circuit Court for that county, and was there tried by a jury which found him guilty and assessed his punishment at imprisonment for two years in the penitentiary.

He was accordingly sentenced by the court to that imprisonment.

While on his way thither, in the custody of the sheriff of Rockbridge county, he sent out this writ which was served on the sheriff. That officer produced the petitioner in the District Court then in session in Richmond, and made return to the writ that he held him by virtue of the conviction and sentence of the Circuit Court for Rockbridge county, making the record of the trial and conviction there a part of his return.

This return the petitioner traversed, denying that there was any court or judge in Rockbridge county as *pretended* by said *pretended* record, and that the paper exhibited was any record as alleged.

The State of Virginia appearing by the Attorney-General Mr. Judge H. W. SHEFFEY, the judge of the Circuit Court for Rockbridge by Bradley T. Johnson, Esq, and the sheriff by James Neeson, Esq. they joined issue on this traverse.

The petitioner then proved that Judge SHEFFEY had been a member of the House of Delegates in 1849. That in 1862, he was Speaker of the House of Delegates, and that his votes were recorded for affording men, money and supplies to support Virginia and the Confederate States, in the war then flagrant with the United States.

It was admitted that he was duly appointed on February 22, 1866, by the then government of Virginia,

Statement of the Case.

to be judge of the Circuit including the county of Rockbridge ; that he immediately entered on the duties of that office, and that he has ever since and still is discharging the functions of the same.

The cause was argued at great length in the District Court, before the District Judge in December, 1868, who ordered the discharge of the petitioner, whereupon an appeal was prayed by the sheriff under the *habeas corpus* act of 1867, to the Circuit Court, and the petitioner admitted to bail.

Before the Circuit Court could meet other writs of *habeas corpus* were sued out by other parties convicted of felonies, two of them of murder, on the same ground as in this case, and the petitioners were discharged.

A motion was then made by James Lyons, Esq. in the Supreme Court of the United States for a *writ of prohibition* against the District Judge, to restrain him from further exercise of such power.

The Supreme Court advised on the motion, and never announced any conclusion, but shortly afterward the Chief Justice opened the Circuit Court at Richmond, and immediately called up the appeal in Griffin's case.

This statement is necessary for a full understanding of the pregnancy of the Chief Justice's statement that the Supreme Court agreed with him as to the decision he rendered in this case.

In consequence of the failure to oust the state officers disfranchised under the fourteenth amendment by these and similar judicial proceedings, Congress in February, 1869, passed a joint resolution directing that all such officers should be removed by the military commanders of military districts into which the late Confederate States had been divided.

Thus all the old officers of the State Government of Virginia were removed except a very few, and new ones appointed not obnoxious to the denunciation

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of the Federal bar—the Supreme Court of Appeals of Virginia; the judges thereof having been removed by the Major General commanding, he appointed as judges in their stead, a colonel of his staff, and two others, who had held or did then hold commissions in the United States army.

The President Judge of the court performed his functions and drew his pay as colonel and judge advocate on the staff, overlooking the execution of the laws of the military, and at the the same time those of presiding judicial officer of the state.

Bundy, for the petitioner.—The first question to be met in the argument of this case, is the question of the power of this court or of your Honor as Circuit Judge, sitting at chambers, to interpose the arm of Federal authority and grant us the relief which we ask :

Whether, or not, this court would have a right, independent of any express grant of power in the statute, to interfere for the protection of citizens of the United States who were held in custody in violation of the constitution of laws of the United States, is a question which, happily for the patience of the court, we are relieved from considering at all by the act of February 5, 1867, under which this proceeding is brought, the important section of which is as follows :

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several courts of the United States, and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus*, in all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States, and it shall be lawful for such person so restrained of his or her liberty to apply to either

Argument for the petitioner.

of said justices or judges for a writ of *habeas corpus*, which application shall be in writing, and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made, shall forthwith award a writ of *habeas corpus*, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States. Said writ shall be directed to the person in whose custody the party is detained, who shall make return of said writ, and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person within three days thereafter, unless said person be detained beyond the distance of twenty miles, and if beyond the distance of twenty miles and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days.

“ And upon the return of the writ of *habeas corpus*, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning shall request a longer time. The petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution and laws of the United States, which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge before or after the same is filed, as also may all suggestions made against it, and thereby, the material facts may be ascertained. The said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony, and the arguments of the parties interested; and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United

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States, he or she shall forthwith be discharged and set at liberty.

“And if any person or persons to whom such writ of *habeas corpus* may be directed shall refuse to obey the same, or shall neglect or refuse to make return, or shall make a false return thereto, in addition to the remedies already given by law, he or they shall be deemed and taken to be guilty of a misdemeanor, and shall on conviction before any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars, and by imprisonment not exceeding one year, or by either, according to the nature and aggravation of the case. From the final decision of any judge, justice, or court, inferior to the Circuit Court, an appeal may be taken to the Circuit Court of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court, to the Supreme Court of the United States, on such terms and under such regulations and orders as well for the custody and appearance of the person alleged to be restrained of his or her liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings as may be prescribed by the Supreme Court, or in default of such, as the judge hearing said cause may prescribe, and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceedings against such person so alleged to be restrained of his or her liberty in any state court, or by or under the authority of any state, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus*, shall be null and void.”

It will be observed that the statute is so framed as to exclude, so far as language is able, all doubt or cavil as to what is the legislative will.

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No restrictive or ambiguous words, no qualifying clauses, no circuitry of language, are employed. The fullest and largest powers are conferred upon the several courts of the United States, and the several judges and justices thereof: and to leave nothing to doubt as to the powers granted being cumulative, and in enlargement of the powers heretofore vested therein, it reads, "in addition to the authority already conferred by law shall have power to grant, &c."

The necessary effect of such general and inclusive language is to render inapplicable to this case much of the judicial authority which two centuries of adjudication and discussion have thrown upon the nature and use of this ancient and beneficent writ.

From 1627, when the first statute of personal liberty—that of Charles Second of England—was wrung from kingly prerogative, down through our own revolutionary annals, and at intervals ever since, crises have occurred in our national affairs which have called for the enlargement of the powers of courts by means of this remedial writ of *habeas corpus*, and so necessary a part has it become of our judicature that it has not inappropriately been termed the "water of life to redeem from death of imprisonment."

Although the Constitution, Art. I., § 9, declared "that the writ of *habeas corpus* shall not be suspended, except when in cases of rebellion or invasion the public safety may require it," yet without an act of Congress to give it "life and activity" it would only exist as a bare right without the appropriate means and rules for its exercise: Hence the judiciary act of 1789, prescribed the jurisdiction of the Federal courts and justices under this writ. The fourteenth section of this act provides—

"That all the before mentioned courts of the United States (Supreme Court, Circuit Court, and District Court), shall have power to issue writs of *scire facias*,

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habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the justices of the Supreme Court, as well as judges of the districts courts, shall have power to grant writs of *habeas corpus*, for the purpose of inquiry into the causes of commitment, provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless when they are in custody under and by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”

This statute was deemed sufficient for all the purposes of security to personal liberty, until the year 1833, when the hostile attitude assumed by South Carolina towards the general government, became the occasion for the passage of the act of March 2, 1833, which has especial reference to commitments by the courts and magistrates of the several states. It provides as follows :

“That either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority or law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof, anything in any act of Congress, to the contrary notwithstanding.”

Again, in 1842, the arrest and trial of Alexander McLeod by the state authorities of New York, upon the charge of burning the steamer *Caroline* in the Niagara river, and the apparent insufficiency of the statute to enable the general government to maintain good faith

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towards foreign nations, where the jurisdiction of a state had first attached, forced Congress to pass the act of August 29, 1842, by which power was given justices of the Supreme Court and judges of the District Courts of the United States to grant this writ, for the purpose of bringing before them all persons who are committed or confined, or in the "custody of" the authority of any state, on account of any alleged order or sanction of any foreign state, the validity or effect whereof depend upon the law of nations. During the late war, the powers of the Federal courts were again still further enlarged by the act of March, 1863, to extend to a class of offenders who had fallen into military custody, and who, but for this act devised for their relief, might languish in prison without a trial.

Next in the order of legislation by Congress is the act of February 5, 1867, under which this proceeding is brought, and this act, like its predecessors, is *sui generis*, and expressly framed for the emergency that called it forth. What was that emergency? And what the proper scope and purpose of this act? Blackstone lays down the rule for the interpretation of statutes in his Commentaries, vol. 1, (marg.) pp. 50-60, as follows:

"We must consider the cause that moved the legislature to enact the law. The fairest and most rational method of devising the will of the legislator is, by exploring his intentions at the time when the law was made by signs the most natural and probable, and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law."

The same rule is laid down by the United States Supreme Court in *Ex Parte Milligan* (4 Wall. 114). They say—

"In interpreting a law the motives which must have operated with the legislature in passing it are proper to be considered."

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With this rule for our authority, let us glance at the condition of the country, at the date of the passage of this act (February 5, 1867), and therefrom seek for the motives of Congress in passing it.

At the surrender of the armed forces of the rebellion, the officers and soldiers were paroled to go home, there to remain free from molestation as long as they continued faithful to the laws of the land. Beyond this nothing was settled by the surrender. Over all the territory comprised within the ten states lately in arms, civil governments and all political institutions were completely demolished. The then incumbents of state and municipal offices had sworn to support the constitution of the "Confederate States of America" against all enemies, and especially against the authority of the United States. The surrender of her armies left the legislative, executive, and judicial departments of each state, and of the central Confederate power, without the breath of life. Over the whole territory civil government was prostrate, and the inhabitants reduced to disorganized communities. Then followed two years of fruitless experiment with the "policy" of the President. No power able to speak the dead to life had raised its voice until Congress passed the series of reconstruction acts over the Presidential veto by the constitutional majority of two-thirds, and then, for the first time, the disjointed parts of the framework of Southern society began to come together, and the revolted states were put in train for re-admission to all the rights and privileges in states of the Union. The grounds upon which Congress based its action are clearly set out in the preamble to that act, and are as follows :

"Whereas, no legal State Governments or adequate protection for life or property now exists in the rebel States of Virginia, &c.; and, whereas, it is necessary that peace and good order should be enforced in said

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states until loyal and republican State Governments can be legally established, 'Therefore, be it enacted, &c.'"

That act first sweeps away the debris of the civil wreck that occupied the territory of the rebel states, and supplies its place by a military establishment with the fullest powers over life, liberty and property, only limited by the conditions, "that no cruel or unusual punishment can be inflicted," and no sentence of death can be carried into effect without the approval of the President. So complete is the substitution of the military for the civil power by the scope and tenor of this act, that without the special discretion given the district commander in the third section, to "allow local civils tribunals to take jurisdiction of, and to try offenders," it was foreseen that he would be deprived of a useful means, familiar to the people, for the prevention and punishment of crime. But this premission to the district commander to "allow the local tribunals," &c., in no degree relieves him from his official responsibility to the government for the faithful execution of the laws. These local tribunals act only by his permission, and their acts have no validity or effect except as he "allows" and approves them. This being the character of the tribunals known as "courts," within this State—little more than ministerial agents or agencies of the military commander—it is plain that many of the presumptions and maxims of the law that obtain in communities where the structure of civil society has remained undisturbed for many years, and where courts exist not by the orders of a military officer, but *proprio vigore*, do not here apply; for example, under the latter conditions of society, there is a presumption of law, that a "man acting in a public capacity is duly authorized so to do," and that "the records of a court of justice have been correctly made according to the rule '*res judicata pro veritate accipitur*,'" that "the

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decision of courts of competent jurisdiction are well founded, and their judgments regular and legitimate," &c., yet these presumptions, resting upon the general principle that the continued existence and regularity of long-established institutions will be presumed until the contrary is shown, can have no proper force within the unreconstructed States. But no correct interpretation of this act is possible without taking into one view all the other acts constituting the series of reconstruction acts. The first in order of these is the civil rights bill, then the joint resolution of June 16th, 1866, submitting, for ratification, to the several states, the constitutional amendment known as the fourteenth article. Then follows the *habeas corpus* act, and lastly, the act of March 2, 1867, to "provide for the more efficient government of the rebel states," and the acts amendatory thereof. Of this series of reconstruction measures only two, the constitutional amendment, and the *habeas corpus* act, are permanent in their nature. The other two are mere scaffolding, to be removed when they have served their temporary purpose in building up the strong pillars of the constitutional amendment. Although a considerable period of time elapsed between the passage of the first and last of these laws, the congressional history of that period will show that they were under consideration by the national legislature at the same time, and each was passed in view to its mutual and combined operation with the others. In this relation, then, should they be interpreted by the courts.

The facts in this case, as set forth in the petition, are briefly these :

Cæsar P. Griffin was tried in September last upon a charge of felony, and thereof convicted by the Circuit Court of Rockbridge county, Hon. Hugh W. SHEFFEY presiding as circuit judge. It is set out in the petition and fully proved upon the trial, that Hugh W. SHEFFEY falls within the class of persons who are expressly

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disqualified and forbidden by the fourteenth article of the amendments of the constitution from holding any office, civil or military, under the United States, or under any state. We claim, therefore, that being so disqualified to perform the functions of a judge, by constitutional prohibition, his acts as such judge are wholly null and void, and therefore, that the officer holding the petitioner in custody, having no valid authority in law for his detention, must be ordered by this court to discharge him.

The return of the respondent merely sets out as his authority for holding the petitioner, the record of his trial, conviction and sentence: claiming for the court the authority of a *de facto* court, and for the record that it can not be disputed in any other court, whether state or national. The petitioner denies the truth of the return in toto, and re-affirms the allegations in his petition, thus putting squarely at issue both the legal validity and the authentication of the proceeding of the pretended court.

The third section of the amendment provides that "No person shall . . . hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort the enemies thereof; but Congress may by a vote of two-thirds of each house, remove such disabilities."

In the interpretation of this section of the amendment, it is important to know the proper and generally accepting meaning of the word "hold"—as upon the signification of that word much of the force of the argument rests. Webster defines the word, to hold "to stop, to confine; to restrain from escape; to keep fast,

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to retain," and he remarks—"It rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined."

I respectfully submit to the court the following propositions as applicable to this case, and as well founded in law :

I. That the fourteenth article of the amendment acts *proprio vigore*, and without the aid of additional legislation to carry it into effect.

II. That it is binding upon all courts, both state and national, and that every United States judge is required by his oath of office to take cognizance thereof.

III. That the holding of the office of circuit judge by HUGH W. SHEFFEY, after the proper announcement that this amendment had been ratified, was a daily usurpation of office in open defiance of the highest law of the land.

IV. That HUGH W. SHEFFEY being so disqualified and prohibited from holding any office, he was not in law a judge, either *de jure* or *de facto*, and his acts as a pretended judge have no legal validity whatsoever, but are simply trespasses.

V. That the act of February 5, under which this proceeding is brought, authorizes this court to inquire into the authority by which the petitioner is deprived of his liberty, and to determine whether that authority is exercised in contravention of the constitution of the United States, and in such case to grant the prayer of the petitioner.

It is sufficient in support of the first proposition to cite the proclamation of the Secretary of State, of the date of July 28, 1868, reciting among other things the joint resolution of the two houses of Congress declaring the fourteenth article of the amendments duly ratified and adopted as a part of the constitution of the United States, and following with his own official declaration in these words: "and I do further certify, that the

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said amendment has become valid to all intents and purposes as a part of the constitution of the United States," and the formal recognition of the same fact by the judiciary in the person of the Chief Justice of the Supreme Court, in his charge to the grand jury at Wheeling, West Virginia, in August last.

The second proposition is supported by the constitution itself, article 6, § 2, which declares—"This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The truth of my third proposition necessarily follows from the two former.

The first serious difficulty is met in the support of the fourth proposition.

We are met at the threshold of the inquiry with the objection that whatever may have been the personal disqualifications of HUGH W. SHEFFEY, his official acts are those of a *de facto* judge, and as such, they are shielded by the law from question in any other court, except upon writ of error or appeal. But this is to beg the whole question. Exactly what we are contending for, and have set up and proved in this case, is that HUGH W. SHEFFEY was not, on the day of the trial of the petitioner, a judge in any character, either *de facto* or *de jure*, being then expressly disqualified and prohibited from holding such office, and that his acts are purely trespasses.

It will be observed that the objection is not that we do not go the right way about this inquiry, but that the petitioner can not make the inquiry at all.

We will suppose that a subject of some foreign power had sat in SHEFFEY's place, and had been able by force or fraud to usurp the powers of a court for the

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time being, and had sentenced the petitioner to be hanged, and this court had been called upon at the last hour to interfere by *habeas corpus*. Would it be a sufficient return to this writ to set out the record of his trial and conviction, attach thereto a seal, and under the protection of that seal, to claim for the court proceedings, whatever may have been their character, absolute immunity from investigation? and yet the objection must go so far as this or it is good for nothing; and this rule once adopted within the territory of Virginia, the *habeas corpus* act of 1867 becomes a dead letter, and there is absolutely no right of appeal to the Federal courts in the very class of cases that this act was devised and intended to meet.

Again, if this rule that we can not go behind a court record by this proceeding, is to prevail, what is to prevent Lynch law from overriding all legal authority: providing only, the "regulations" can obtain a court seal with which to cover the record of their violence? Suppose Judge Lynch were to open his court at some four corners within this state for the trial of a band of horse-thieves. The "jury" arraign the prisoners, hear the evidence, and condemn them to death; one of them has powerful friends who sue out a writ of *habeas corpus* in his behalf; he is brought before the United States Circuit Court, with the cause of his detention duly certified by the pretended officer, who sets out in his return that he holds the prisoner by virtue of a judgment and sentence of a "court" (meaning Judge Lynch's court), which has found him guilty of horse-stealing. Would this court be debarred from inquiry into the jurisdiction of such a judge, and from discharging the prisoner, merely because the mob have proceeded under the forms of law? and hence are a *de facto* court? And yet such a tribunal has as much claim to power as the Circuit Court for Rockbridge county. Both are illegal tribunals for want of judicial

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authority; and the judgments of both, however righteous in themselves, are absolutely void; for such a court has no more power to render a just than an unjust judgment, and no power at all to render either the one or the other, because both tribunals are forbidden by the supreme law of the land.

No human being in this country can exercise any kind of public authority, which is not conferred by law, and under the United States it must be conferred by the special words of a written statute.

While it is true that I have not been able to find any adjudicated case that could be followed as a precedent in the case now before the court, the sufficient reason for that is found in the fact that no historical parallel for the political and civil condition of this state is known to exist.

For certain purposes Virginia is a conquered territory, while for certain other purposes she is held never to have severed her relations to the Federal government as a state. But whatever may be the present practical relations of the state to the general government, the allegiance of the people comprised within her limits, was never successfully withdrawn. In the language of Chief Justice CHASE, in *Shortbridge et al. v. Macon*, an opinion delivered in Raleigh, North Carolina, in June, 1867, under the reconstruction act: "On no occasion, however, and by no act have the United States ever renounced their constitutional jurisdiction over the whole territory, or over all the citizens of the Republic, or conceded to citizens in arms against the country the character of alien enemies, or to their pretended government the character of a *de facto* government."

But independent of the *habeas corpus* act, there are many decisions of authority that stop but little short of the extent to which we contend this right of one

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court to inquire into the legal authority of another should be carried.

The Supreme Court of the United States in *Williamson v. Berry* (8 *How.* 540), says: "It is a well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has risen under the laws of nations, the practice in chancery, or the municipal laws of states." This court applied it as early as the year 1794, in the case of *Glass et al. v. Sloop Betsey* (3 *Dallas*, 7); again, in 1803, in the case of *Rose v. Himely* (4 *Cranch*, 241); afterwards, in 1828, in *Elliott v. Piersol*, in case of ejectment (1 *Peters*, 328, 340). In the last case it is said—"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decisions be correct or otherwise, its judgment, until reversed, it is regarded as binding in every other court. But if it act without authority its judgment and orders are nullities; they are not voidable, but simply void" (see likewise *Wilcox v. Jackson*, 13 *Peters*, 499; *Schrivver, lessee, v. Lynn*, 2 *How.* 59; *Lessee of Hickey v. Stewart et al.*, 3 *Id.* 750; also *Sergt. Constl. Law*, 286; *Ex Parte Almeida*, 2 *Wheeler's Crim. Cases*, 576; and *Meade v. Depty. Marsh. Va.*, *Id.* 569; 11 *Amer. Jurist*, 257 [case of J. H. Pleasants]; also case of R. B. Randolph, *Id.* 338). This right to inquire into the validity of a judgment has been so repeatedly exercised by all the states, that I do not deem it necessary to cite more than two or three cases.

In Massachusetts the question was made in 1814

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(The Commonwealth *v.* Harrison, 11 *Mass.* 63). On the trial of this case, counsel for the defense cited the opinion of KENT, Chief Justice, in Ferguson's case (9 *Johns.* 239), that the state courts have no jurisdiction in cases of this kind. The court answered very briefly, but emphatically—"This court has authority, and it will not shun the exercise of it, on proper occasions, to inquire into the circumstances under which any person brought before them by a writ of *habeas corpus* is confined or restrained of his liberty."

While upon this general subject, what defects will render judgment and process absolutely void, I will cite two leading cases, that of Brook *v.* Adams (11 *Pick.* 441), where it is held that jurisdiction may be shown to be defective in the organization of the court, and Slocum *v.* Simms & Wise (5 *Cranch's Rep.* 363), where it is held by Chief Justice MARSHALL that a judgment may be defective in respect to the qualification of the officer, where a magistrate was held incompetent to sit in the discharge of a debtor under the insolvent laws of Virginia, and the judgment of discharge rendered by magistrates, of which he was one, was declared to be wholly void: and this too when this decision was against personal liberty, and its effect the recommittal of the bankrupt to prison, where the law should receive a restrained construction.

See, also, Hill *v.* Wait (5 *Verm.* 124; and Bates *v.* Thompson, 2 *Chip.* 96), for the effect upon a judgment where the justice is related to one of the parties, and therefore disqualified by statute. But it is sometimes said that the judges in Virginia, holding their offices directly under the authority of the military district commander, they are not accountable to any civil tribunal.

The answer we make to this, is, that we are not trying nor seeking to try HUGH W. SHEFFEY. We are merely trying the effect of this judgment, and that de-

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depends upon his legal authority to make it. If he had no such authority—if he usurped a jurisdiction which the law had forbidden him any longer to exercise, then his acts are absolutely void, and no military order from whatever source can make them valid; for says the Supreme Court in *Ex parte Milligan* (4 *Wall.* 120–121), “The Constitution of the United States is a law for rulers and people equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.” So that whatever may have been the right of the district commander to employ or “allow” courts of this character to try offenders before the ratification of the fourteenth article, he certainly had no such right or authority after the ratification of that article, because it then became a law to him as well as to the courts. The language of the third section of the fourteenth article is, that “no person shall hold any office, civil or military, under the United States or under any state.” This language is in the alternative, and if the officer in question be found to belong to either the one or the other of these classes, then the constitutional prohibition applies, and the incumbent who falls into the disqualified class of persons, was on July 28, 1868, divested of his judicial powers and authority, and became that day, in the fullest sense of the word, *functus officio*. But it is sought to break the force of these deductions by the suggestion, that the constitution has no application nor force in the unreconstructed states. If so, when was it withdrawn by the general government, or when was it thrown off by Virginia? Did Congress, by the act of March 2, 1867, design to withdraw the constitution from the states to which that act applies? It is not denied that such an act might have been done by the law-making power, but certainly it is not conceivable that it would be done by a mere implication, without express words of solemn enactment. And that it was not done, is

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sufficiently evidenced by the notorious fact that the highest court of the nation had under consideration at its last session, and still has, undecided, the question of the constitutionality of this very act. But it is an indignity offered to this court to assert that it is now sitting for a judicial district that is situated without the pale of the constitution, unless forsooth that pleasant fiction of the law of nations that clothes our ambassadors to foreign courts with an atmosphere of our own nationality can be applied to our federal judges, and they can be said to preside "near" the city of Richmond in the province of Virginia, as the former are said to reside "near" the court of St. James and St. Cloud. But the judge must then fetch and carry the constitution with him, for it is his own "vital breath," and his coming and going would indeed mark the summer and winter solstice of this dreary blank in the republic.

If, then, the Constitution of the United States is in force within this state, and "is a law for rulers and people," the plain infraction of its provisions, by HUGH W. SHEFFEY, in trying and committing the petitioner, furnishes the occasion for which the remedy provided by Congress in the *habeas corpus* act of February 5, 1867, may be rightfully invoked ; for that act empowers judges and courts "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty, in violation of the Constitution of the United States."

The objections to this theory are variously stated, but they can mainly be resolved into two, one of which, at least, is founded in a misapprehension of the effect and nature of this remedy. It is said by those whose dependence upon the honor or profits of office, seems to have quickened their sensibilities to the dangers of any scrutiny into their qualifications, that we can not attack the authority of a judge in such a collateral proceeding ; that our proper remedy is by proceeding in

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the nature of a *quo warranto*, and they add, that this can only be carried on by the supreme authority of the state. This has already been answered by showing that the object had in view by us, is not to unseat HUGH W. SHEFFEY, and no judgment of this court can have that effect. The public discussion of this question will doubtless tend to call public attention to the effrontery of his pretention that he can continue to perform the functions of a judge in daily defiance of the supreme law of the land. But the direct and avowed purpose sought by this petition, is the release of Cæsar P. Griffin from unlawful imprisonment, and beyond this the court is neither asked nor expected to go.

The remaining objection to granting the prayer of the petitioner is found in the principle sought to be applied to this case, that the acts of a "judge *de facto*, if within the rightful jurisdiction of the office he exercises, are as valid and binding as the acts of an officer *de jure*." The term *de facto* from being applied to officers acting *colore officii*, and with apparent authority of law, has in this argument been used to describe every species of pretender to official character, however disqualified or prohibited he may be by law. This is certainly a great latitude of interpretation, and must have the effect to obscure or destroy the original and true meaning of the expression. According to the argument upon the other side it seems only necessary, in order to establish for any man the character of a *de facto* judge, to prove actual manual possession of the bench, and control of the seal, no matter how obtained. This argument, if carried out, would give full faith and credit to judicial acts of a deposed judge, done after conviction of impeachment, or judgment of ouster in a proceeding by *quo warranto*, and provided only the pretender were bold enough, he might perpetuate his official character.

In the 1st vol. of J. J. Marshall's (Kentucky) Re-

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ports, page 206-7, may be found the case of Meredith's heirs v. McIntire's devisee, where Judge Robertson discusses at length the proper limits to be given to the use of the term *de facto* in a state that is under a written constitution. The case arose upon an attempt of the legislature of Kentucky to supersede the Court of Appeals, and to provide a new court in its place. Under the new law four judges were duly appointed, and organized by the appointment of a clerk. An appeal was taken from Bourbon county to the Court of Appeals, and by them dismissed, because the record was not filed with F. P. Blair, who was acting as clerk to them. A certificate of dismissal signed by Blair, as clerk of the Court of Appeals, was presented to the clerk of the Court of Bourbon, and though objected to by the counsel of the appellants, was received and entered upon the record of the court, and thereupon a *habere facias* was directed to issue to carry into effect the original decree, to reverse which the appeal had been granted.

Says the court—"The only question presented for our decision is whether the court erred in obeying the mandate of Messrs. Barry, &c., certified by F. P. Blair, and a solution of this question depends on another, viz., whether Barry, &c., were judges of the Court of Appeals, and Blair its clerk. Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they had been regularly appointed under and according to the constitution. A *de facto* Court of Appeals can not exist under a written constitution which ordains one Superior Court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. . . . Where there is a constitutional executive and legislature, there can not be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky, as a *de facto* Court of Appeals.

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Argument for Judge SHEFFEY.

There can be no such court whilst the constitution has life and power. 'There has been none such.'

With him, *L. H. Chandler*, U. S. District-Attorney ; *H. H. Wells*, Military Governor of Virginia.

Bradley T. Johnson, for Judge SHEFFEY.—The petitioner in this case was regularly indicted, tried, and convicted in the Circuit Court for Rockbridge county, of a felony under the laws of Virginia, and sentenced, according to the verdict of the jury which tried him, to imprisonment for two years in the penitentiary.

While on his way thither, in the custody of the sheriff of that county, in obedience to the mandate of the court and the requirement of the law, the steps of that officer are arrested by the writ of *habeas corpus* issuing out of this court on the petition of the party.

He applies to be discharged from custody, alleging that he is detained under color of a pretended judgment—pretended to have been entered by a pretended court, presided over by a pretended judge. He then charges that HUGH W. SHEFFEY, who acted as judge on his trial, which took place since the adoption of the constitutional amendment, was in law no judge at all, he having been disqualified from acting after the adoption of the constitutional amendment known as the fourteenth article ; Judge SHEFFEY having taken the oath to support the Constitution of the United States, and acted in a legislative office in the State of Virginia, and afterwards aided the rebellion. To the writ, the sheriff makes return, producing the prisoner, that he holds him by virtue of a conviction for felony, and sentence thereon, of the Circuit Court for Rockbridge county, and that he was on his way to take him to the penitentiary when the writ was served. He exhibits the record of trial, conviction, and sentence of the Rockbridge court as part of his return.

The petitioner files a reply or traverse to this return,

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denying that there is any court as alleged, or any judge as alleged, or that the paper produced and exhibited as a record is any record as alleged.

On this traverse the state joins issue. The petitioner then offered evidence :

1. To prove that Judge SHEFFEY was a member of the House of Delegates of Virginia in 1849 ; and,

2. That in 1862, being Speaker of the then House of Delegates, he voted men, money, and supplies to supplies to support the State of Virginia and the Confederate States, in the war then waging with the United States.

To this evidence the state objected ; but the court admitted it, and the state excepted.

The petitioner then read from the journals of the House of 1849 and 1862 to prove these facts, and also by a former clerk of the senate who had been clerk since 1853, that it was the custom for members of the senate to produce to the clerk a certificate from a justice of the peace or other proper officer that such member had duly taken all the oaths required by the constitution to be taken. No evidence was offered that Judge SHEFFEY, as member of the House of Delegates, took the oath to support the Constitution of the United States.

It was then admitted that the HUGH W. SHEFFEY mentioned in the journals of 1849 and 1862 was the same HUGH W. SHEFFEY who sat on the trial of the petitioner ; and further it was admitted, that HUGH W. SHEFFEY was on the 22d day of February, 1866, duly appointed by the then existing government of Virginia to be judge of the circuit including the county of Rockbridge ; that he immediately entered on the duties of that office, and that he has ever since, and still is, discharging the functions of the same.

These are the facts on which the petitioner asks his discharge.

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The proposition on which he bases his claim is this : That Judge SHEFFEY has been rendered ineligible as judge by the adoption of the constitutional amendment, and therefore all his acts since that period are void ; in other words, that the acts of an officer illegally in office being void, the consequences of those acts are also void.

A proposition so monstrous in its results, so extraordinary in its application to all the affairs of men, which strikes at the very foundation of civil society, deserves strict examination and careful investigation, if it be law. If it be not law, it must be peremptorily thrust out of a court of justice, branded with all the ignominy of judicial denunciation. If the acts of officers disfranchised by the constitutional amendment are void, and of no effect, then judgments rendered, decrees made, deeds acknowledged and recorded, wills proved, notes protested—all fall with the ineligible officer. If these acts of theirs are void, all acts are void ; although qualified themselves, they may have been sworn into, appointed, or elected to office by disqualified officers. The source being corrupt, the whole stream of consequences partakes of that corruption. Disqualification from bribery, dueling, non-residence, age, citizenship, or alienage, all work the same result. If a judge is appointed by a legislature, some of whose members are disqualified from holding their seats, then his appointment, according to this argument, is void, and his acts are void. The legislature itself may all be eligible, but some members may have been elected by illegal votes. Therefore the acts of the legislature, being vitiated by the original taint of illegality, all the consequences flow from it. If a constitution be adopted by illegal votes, then all officers under it become mere intruders and pretenders to official functions. The existence of this very fourteenth article itself may be attacked in precisely the mode the judicial functions of

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Judge SHEFFEY are sought to be invalidated. One of the state legislatures at least, adopted it by the votes of members who were afterwards declared ineligible, and their seats vacated ; and under this theory of law, the inquiry might be pursued, until it was found that it had never received the assent of a sufficient number of legal legislatures composed of legal members duly sworn in by legal officers, and elected by legal voters.

The statement of such a proposition is its own sufficient refutation. If it be true, no legal act, no legal existence anywhere is secure. All may be attacked by showing that somewhere, at some time, some person disqualified by law from holding office contributed by some official act to it. That established, the whole falls.

I propose to show that no such proposition has been sanctioned in any court for centuries of any such principle of law, and that an unbroken current of authorities in this country, and in England, against it, is never rippled by a dissenting or even objecting opinion from any court, any judge, or any law-writer.

The writ of *habeas corpus* is the writ of right, say the fathers of the law ; but it is in no case a writ of error, and it never had been used to review the decisions of other tribunals. From the earliest times down to later days it has been universally held that where the party applying for it appeared on his own application to be committed by the judgment of a court of competent jurisdiction, the writ would be refused him, or that where such commitment appeared on the return to the writ, that such return was conclusive. This is the settled law of *habeas corpus* in England and here (Brass Crosby's case, 3 *Wilson*, 188 ; Ex parte Kearney, 7 *Wheat.* 45 ; *Ableman v. Booth*, 21 *How.*).

The only inquiry that could be made was :

1. Had the court jurisdiction over the subject and the subject-matter ? and,

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2. Did that jurisdiction legally attach (Sir William Chaney's case, 12 *Rep.* 82; Goldswain's case, 2 *W. Black.* 1207; *R. v. Gardiner*, *Cro. Eliz.* 821; 2 *Hawk. P. C.* ch. 15, § 78; *People v. Cassells*, 5 *Hill*, 164)?

And this was the law of the Federal courts under the act of 1789, which authorized them to issue writs of *habeas corpus*, "agreeably to the principles and usages of law."

In the course of time, however, collisions became inevitable between the concurrent state and Federal jurisdictions.

Parties might be deprived of their liberty contrary to the laws of the United States. The slow process of writ of error from the state courts contemplated by the judiciary act was utterly ineffectual as a remedy for such wrong, and the writ of *habeas corpus*, the return showing the party to be held by judgment of a court of competent jurisdiction, could afford no relief. Besides, in many states the record on writ of error would disclose nothing contrary to Federal laws and Federal right. A party might be indicted, tried, and convicted for robbery, and the record would only show that charge, no bill of exceptions being allowed in criminal cases at common law, or in states adhering to common law. The appeal, therefore, to the Federal tribunal would be vain, while in truth and fact the robbery for which the party was convicted was collection of Federal taxes.

To meet such cases, the jurisdiction in *habeas corpus* was extended by the act of 1833, which provided, that whenever any officer of the United States was in custody, for any act done or omitted to be done by Federal authority, then the Federal court might on *habeas corpus* inquire into all the circumstances of his committal or conviction, and vindicate his Federal rights. This act extended over all officers of the Federal government, the perfect and complete panoply of

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the Federal jurisdiction, and secured them perfect protection for all acts done by them in the execution of their office.

Though passed to force South Carolina, attempting to nullify, it was never practically operative until applied to cases arising under those state laws which actually did, by personal liberty acts, nullify the laws of Congress and the Constitution of the United States. And the Federal judges, without exception, applied the law, and protected officers of the United States in the discharge of their duties. They released them when held by state authority in defiance of their Federal rights (*United States v. Morris*, 2 *Am. L. R.* 348; *Ex parte Sifford*, 5 *Id.* 659; *Ex parte Jenkins*, 2 *Wall. Jr.* 521).

After this, however, it was found that other cases might arise requiring Federal intervention to protect other cases of violated right.

McLeod committed a felony within the jurisdiction of the state of New York, and was tried for it by the state authorities. The government of Great Britain, whose officer he was, assumed the responsibility of his act, and under the law of nations, the agent should have been released, and the principal alone held responsible. New York, however, refused to release McLeod, and in consequence, the act of 1842 was passed, extending Federal protection to all aliens held anywhere, by any authority, in violation of treaty rights, or those under the laws of nations. Treaty rights, created by Federal authority, or international rights, recognized and guaranteed by Federal authority.

This law also was to intervene the Federal authority to protect Federal rights. The act itself is in the main a copy of the act of 1833, so far as those provisions go, which give the Federal courts the right to inquire into the cause of commitment. By these two acts of Congress, therefore, the ægis of the Federal power was

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thrown around its officers and those aliens partaking of its hospitality. Those two classes alone were thus secured by this prompt and efficient remedy from any infringement of rights secured to them by the Federal authority.

They could not be obliged, when held to answer in a state court, to wait the slow process of trial there, appeal to the state supreme tribunal, and thence to the supreme Federal court, with the certainty in many cases, as I have shown, of being unable to prove by the record in what manner their rights were injured. Whenever they were injured, *habeas corpus* afforded a remedy, simple and prompt. But no other person had such a right. A citizen of one state, going into another state, might there be molested in some mode contrary to his Federal rights, and if his liberty was restrained, his only remedy was by process of appeal or writ of error. Prior to 1867, it was considered necessary to remedy this omission in the law. It was charged that many Southern States, under the pretense of labor, police, and vagrant laws, were endeavoring to evade the force of the constitutional amendment abolishing slavery, and were shaping their policy so as to restore the substance of involuntary servitude, under the name of penalty for crimes. Therefore the act of 1857 was passed, extending the *habeas corpus* to all cases where any person was restrained of his liberty, contrary to the constitution, laws, or treaties of the United States. It is a copy of those provisions of the acts of 1833 and 1842, as to the right of the court to examine into the cause of detention, whether by judgment of a court or otherwise, and in effect strikes out the provisions limiting the application of the act of 1833 to officers of the United States, and of 1842 to aliens, and inserts, instead of those provisions, the words, "all persons restrained of their liberties, in contravention of the constitution, laws, or treaties of the United States." The Federal

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protection before extended only to Federal officers and Federal guests, *i. e.*, aliens, was now made to embrace all persons, citizen and alien, officers, and those who wanted to be officers, of the Federal government; in fact, all mankind. "It brings within its scope," says CHASE, Ch. J., "every possible case of privation of liberty, contrary to the laws, constitution, or treaties of the United States. It is impossible to widen the jurisdiction" (Ex parte McCardle, 6 Wall. 326).

The writ of *habeas corpus*, therefore, when issued by a Federal court, embraces every case where a person is alleged to be deprived of his liberty in contravention of the constitution, laws or treaties of the United States. And the court issuing the writ is authorized in every case to go behind every return, and to pass upon the facts in every case, and if it appear that the party applying is injured in his Federal rights, then such court is authorized to protect him by discharging him, whether committed on a charge of, or on a conviction for, crime. Therefore, it only remains to this court to inquire if this person, the petitioner, is deprived of his liberty, contrary of the constitution, the laws, or the treaties of the United States? Has he, by state authority, been injured in his Federal rights?

The first question that presents itself is, What are his Federal rights?

1. Those secured by treaty or under the laws of nations do not apply in this case.

2. Those enuring to Federal officers to be protected in their functions are not involved here.

3. The Federal rights secured by the constitution to all persons are :

(1). The right of every citizen of a state to be secured in those rights in every other state, which provision is universally construed to mean civil rights as distinguished from political rights.

(2). The rights of trial by jury as secured by the

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reservations in the original amendments to the constitution.

(3). The right to be secured against involuntary servitude, except as a punishment for crime.

(4). The right to a republican form of government.

In this proceeding, this court is to inquire if this petitioner has been injured in any of these Federal rights? Has he been denied any of them? If, on a full investigation of all the facts, without regard to the form of the record, it is found that he is denied Federal rights, then he is to be discharged; if not, he is to be remanded.

No question as to form of government, or to involuntary servitude, or to the rights of citizens of different states enjoying all the civil rights of citizens of this state, arises in this case, and therefore the first, third, and fourth sub-divisions of rights have no application.

The only question to be considered is whether the petitioner has been denied his right to be tried by a jury? The universal judgment of all courts, Federal and state, heretofore has been that this right is only to secure a trial by jury in Federal courts. But for the sake of the argument, we concede that every person within the United States, has a right to the trial by jury, according to the course of the common law.

This is the extreme proposition in favor of the petitioner, and although against the law, we concede it for the purpose of this argument.

This court is therefore to inquire, whether the petitioner has been deprived of his right to a trial by jury, according to the course of the common law? Admitting that this is a Federal right, we are limited to the inquiry as to whether it has been infringed in this case.

It is charged that, although tried by jury, under a law denouncing a penalty against a felony, equally applicable to all persons, triable and punishable in the same way as to all persons, citizens, aliens or officers,

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without regard to color, state or condition, still, nevertheless, the judge being disfranchised by the constitution of the United States from sitting as judge, that the trial was no trial; was contrary to that constitution, and that thereby the petitioner was deprived of his Federal rights, and denied a trial by jury which implies the presence of a legal judge.

That Judge SHEFFEY, being constitutionally ineligible from the moment of the adoption of the constitutional amendment, because *eo instanti* dead as a judge, and by no possibility could be author of a legal trial of any person.

I shall first admit, for the purpose of this argument in this place, that SHEFFEY was, by the adoption of the constitutional amendment on July 28, 1868, rendered ineligible for his office, and from that moment became, in law, incapable of holding it.

This being admitted, for the sake of the argument, and also it being admitted in the cause, that he was appointed judge in 1866, and has ever since, and is now discharging the functions of judge, I shall prove,

1. That he was judge *de facto* when the judgment against petitioner was entered.

2. That the act of a judge *de facto* has precisely the same legal effect as that of a judge *de jure*. If one is binding, the other is, and that there is legally no difference between the acts of a judge *de facto* and of one *de jure*, except when those of a judge *de facto* may enure to his own advantage.

First. Was he a judge *de facto*?

There is no better definition of an officer *de facto* than that laid down by Lord Ellenborough in the case of the King *v.* Corporation of Bedford Level (6 *East*, 368): "An officer *de facto*," says he, "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." And it plainly appears that Judge SHEFFEY was, and is, such

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an officer. No matter whether he be denounced by the constitutional amendment or whether he be disqualified by law, or ineligible to his assumed office, he was, and is, a judge *de facto*, having the reputation of being the judge he assumes to be, and yet, according to the assumption, is not a good officer in point of law.

This, I think, is conclusive. At the time of this judgment he was judge *de facto*.

Next I will prove that as to the acts of an officer *de facto* and an officer *de jure*, there is no legal difference except where the acts of an officer *de facto* inure to his own benefit. Wherever they do, wherever they are tainted with selfish considerations, they are invalid, but whenever they inure alone to the benefit of the public, they are as good and binding as if done by a judge, annointed by oil which ever was poured on the head of a legitimate monarch by an archbishop consecrated through a line of a hundred predecessors.

It is a fundamental maxim, not of the law, but of civilized society, that the acts of officers *de facto* are valid. Without it, there would be no security for life, or liberty, or property. It took form and shape in a statute in the time of Edward as to the rights of a king *de facto*, but its foundation was beyond that.

Without the rights of *de facto* governments, who would recognize the Norman titles against the Saxon Barons? Who the varying rights of York and Lancaster, or Tudor and Plantagenet, of king and commonwealth, and king again, of Stuart and Orange, or Stuart and Brunswick? Where would you find your resting place in the history of civilization? In the Roman empire? In its Gothic conquerors? In the house of Charlemagne? In that of Hugh Capet? In the Bourbon or the Buonaparte?

The kingdom, the republic, the empire, the kingdom, the republic, the empire again. In 1789, in 1783, in 1800, in 1815, in 1848, or in 1852?

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When, where, and how, would you base your rights *de jure*?

Brandenburgh rises on the ruins of other houses, as Hapsburg before it, and will fall again, as Hapsburg has done. The history of the world is the history of kingdoms and empires, and civilizations *de facto*, becoming *de jure*, because they are *de facto*.

Whenever a power, or a government, or an officer are able to maintain themselves in power, it becomes necessary for the peace, the progress, the development of society, that such government, power, or officer should be recognized *pro tempore* as the legal power, and full effect and validity be given to acts under it.

This is the rule of law as well as the rule of reason.

Governments acknowledge it.

After the war of 1812, the Supreme Court of the United States decided that the port of Castine having been captured by the British, and held during the war, the British domination was to be considered *de facto* and *pro hac*, released the citizens of Castine from their obligations *de jure*, as citizens of the United States (U. S. v. Rice, 4 Wheat. 253).

Subsequently, in the war of the South American republics, the Secretary of State of the United States held that a sale of guano islands made by a *de facto* government to citizens of the United States, conveyed a title which the United States were bound to recognize and protect.

The doctrine that acts of *de facto* officers are as valid as if by officers *de jure*, is undenied and undeniable.

It is affirmed in Blackstone, Kent, and every elementary author, and illustrated in Bacon, Comyns, Viner, and every abridgment of the common law.

I spare the court the recital from such authorities, and content myself with producing the adjudications of

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the older English courts and the latest American ones on these questions.

I have with some labor compiled the decisions in all the states up to the present time, and instead of presenting the court with a mere reference to cases, have gathered the sense of each particular adjudication, to illustrate the general meaning and signification of the doctrine.

The whole uninterrupted current of decisions is that the acts of an officer *de facto* are good, valid, and binding. They can not be questioned collaterally, nor in any way, except in a proceeding against the incumbent of the office, to oust him therefrom.

Whenever a party holds office, having, as Lord Ellenborough says, "the reputation of being the officer he assumes to be, although not a good officer in point of law," then, in such cases, his acts have precisely the validity and force as if performed by an officer *de jure*.

A person by color of election may be officer *de facto*, though indisputably ineligible (Knight *v.* Wells, *Lutwych*, 508; 16 Viner's Abridgment, 114).

Where there was a Bishop of Ossory, and another was installed Bishop *de facto*, judicial acts of latter held good (O'Brien *v.* Kerwan, *Cro. Jac.* 552).

Where a steward of a manor, appointed without authority of law, yet acting as steward, and being *de facto* steward, his grant of copyhold land held good by Lord Bacon: "Acts done by one who keeps court as steward without authority, if they come in by presentment from the jury, are good" (Harris *v.* Jays, *Cro. Eliz.* 699).

A commission to take testimony executed by judges after the demise of James I., when their terms expired, and they were not judges, but acting without authority, was held good. The judges certified that "no inconvenience could arise on such proceedings before notice of the King's demise; but, if otherwise, it would draw

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in question many trials by verdict of Nisi Prius, and trials and attainders upon jail delivery ; whereupon divers have been arraigned and executed since the King's demise'' (Sir Randolph Crew's case, *Cro. Car.* 97).

Officers *de facto* of corporation bind the corporation (*Ang. & Ames*, 280 ; *Bank United States v. Dandridge*, 12 *Wheat.* 64).

Whether sheriffs be *de facto* or *de jure* can not be questioned collaterally (*Morse v. Cally*, 5 *N. H.* 223).

Acts of sheriffs *de facto* valid as respects third persons (*Doty v. Gotham*, 5 *Pick.* 487 ; *Fowler v. Bibee*, 9 *Mass.* 231 ; *Comb v. Fowler*, 10 *Id.* 290 ; *Buckman v. Riggle*, 15 *Id.* 180).

In action of ejectment the title of a constable who sold the land not to be questioned. Being *de facto* sufficient (*Burke v. Elliott*, 4 *Ired.* 355).

In same action, title of register who registered the deed, not to be questioned (*Gilliam v. Riddick*, 4 *Ired.* 353).

In action of trespass for seizing a hog by town commissioner. Acts of those holding *de facto* good (*Com. of Trenton v. McDaniel*, 7 *Jones' Law (N. C.)* 107).

In action against defendant for trespass, his acting as officer proves him officer *de facto* (7 *Jones*, 375).

Judicial act of an alderman *de facto* holding and exercising the office not under mere color of right, but possessing a commission on its face, constitutional and legal, can only be examined in a proceeding to which he is party, and in which he can be heard (*Cornish v. Young*, 1 *Ashm.* 153).

Party relying on the record of a deed need not show that he who recorded it was an officer *de jure—de facto* is sufficient (*Brush v. Cook*, *Brayt.* 89).

The acts of an officer *de facto* who comes into office by color of title are valid, as it concerns the public or third persons (*McInstry v. Tanner*, 9 *Johns.* 135).

Where one acts under a colorable title to an office,

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his title can only be examined before the Supreme Court, and that directly (*McKim v. Somers*, 1 *Penn.* 297).

The acts of an officer *de facto*, whether judicial or ministerial, are valid, so far as the rights of the public or third persons having an interest in such acts are concerned ; and neither the title of such an officer nor the validity of his acts as such can be indirectly called in question in a proceeding to which he is not a party (*Plymouth v. Painter*, 17 *Conn.* 586 ; *Hoagland v. Calvert*, 1 *Spencer*, 387 ; *Farmers' and Merchants' Bank v. Chester*, 6 *Humph.* 458).

An officer *de facto* holding *colore officii* is as well qualified to act while thus in office as if legally appointed and duly qualified (*Smith v. State*, 19 *Conn.* 493).

The right of a person acting *colore officii* to the office in which he acts, can be tried only in a proceeding to which he is a party, directly presenting that question, and not in a collateral way, between third parties (*Id.* 489).

A person acting as an officer under color of a commission is *de facto* such officer, until ejected by a proceeding having that object in view. His authority can not be questioned, in a collateral way, and his official acts, until ejected, are valid (*Aulamier v. Governor*, 1 *Tex.* 653).

The regularity of the election or the qualifications of an officer can not be questioned collaterally (*Bean v. Thompson*, 19 *N. H.* 115).

The general rule is that acts of officers *de facto* in which other parties or the public have an interest are valid (*State v. Perkins*, 4 *Zabriskie*, 409).

The acts of an officer *de facto* valid, and not to be questioned collaterally (*State v. Brennans*, liquors, 25 *Conn.* 278).

The official acts of an officer *de facto* can not be im-

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peached collaterally (Stokes v. Kirkpatrick, 1 *Metc.* (Ky.) 138).

The acts of officers *de facto* are valid when they concern the public or rights of third persons, who have an interest in the acts done (Venable v. Card, 2 *Head.* (Tenn.) 582; Patterson v. Miller, 2 *Metc.* (Ky.) 493; Gamley v. Hawkins, 2 *Clark* (Iowa) 75.)

Acts of an officer *de facto* are valid when they concern the public or the rights of third persons, and can not be indirectly called into question in a suit to which said officer is not a party. It is only in a suit against him that his right can be questioned (Hooper v. Goodwin, 48 *Me.* 79).

An officer who has entered on the discharge of the duties of his office is an officer *de facto*, and his eligibility can not be inquired into collaterally, though it may be by *quo warranto* (Satterlee v. San Francisco, 23 *Cal.* 314).

The right to an office can not be determined by an action of replevin of its appurtenances (Desmond v. McCarthy, 17 *Iowa*, 525).

A person elected as county judge for the full time may signify his refusal to qualify, and thereupon the office becomes vacant for that time, and an appointment may be made immediately, although, to prevent an interregnum, the old incumbent of the office is authorized to perform its functions until his successor has qualified (Finch v. Washburne, 17 *Wis.* 658; People *ex rel.* Ballou v. Bangs, 24 *Ill.* 187).

Acts of officers *de facto* valid (Scalding v. Lorant, 13 *Q. B.* 697; 66 *E. C. L.* 686).

Where a judge was ousted from office on *quo warranto*, held that his acts while illegally in office were binding and valid (*Ex relatione* Ballou v. Bangs, 24 *Ill.* 184).

Where the law under which a judge was appointed was held to be unconstitutional, and, therefore, his

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appointment void. Acts done by such judge held valid and binding (Taylor v. Skinner, 2 So. Car. 696).

When a judge was ousted on *quo warranto* and a party sentenced to penitentiary by him while illegally in office was discharged on *habeas corpus* after the judgment of ouster on *quo warranto*, the Supreme Court of Wisconsin reversed the decision of the lower court discharging the prisoner, and remanded him to the penitentiary, on the ground that the acts of the judge *de facto* were good as to all the world, although he was afterwards regularly pronounced not to be legally in office (State v. Bloom, 17 Wis. 521).

These authorities fully establish my proposition, that the acts of a *de facto* judge are as valid and binding as if done by a judge *de jure*, except where such acts are for his own benefit.

And hence it follows that this petitioner has not in any way been injured or denied his rights under the Federal Constitution, so far as being tried by a legal judge is one of those rights. For his trial by a judge *de facto* has precisely the same legal effect as if by a judge *de jure*.

But another view is equally conclusive: Whether the legal State Government of Virginia was overthrown on April 17, 1861, at Richmond, or on April 9, 1865, at Appomattox, makes no difference for the purposes of this argument.

If the former, then the occupation of the territory of Virginia was a mere re-occupation, a re-possession, a re-extension of Federal laws over territory from which they had been temporarily excluded by belligerent forces.

The laws of Virginia of course remained intact and in full force and vigor.

On the other hand, if the legal government fell at Appomattox, then the possession of Virginia was conquest.

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On conquest, the conqueror is bound to administer the laws of the conquered country until he provides another code for them.

This doctrine Lord Mansfield lays down in *Campbell v. Robinson* (*Cow.* 205), where he enters into a detailed statement of the conquests of Great Britain.

And in Sir Thomas Picton's case (30 *Howell's St. Trials*), the Lord Chief Justice acted on it by allowing proof that the Spanish law in the conquered Island of Granada allowed torture to be administered, and that, therefore, its application by the British military governor was justifiable and legal. The law of Virginia being, therefore, in force fully and perfectly, the section relating to *de facto* officers (*Code*, 101), exactly establishes the law by statute, as I have proved it by principle and authority. That section, in effect, declares that all acts of officers *de facto* shall be as valid and have the same effect as if done by officers *de jure*, except where such acts might inure to the benefit of such officer *de facto*. By it, therefore, all questions as to the validity of the acts of Judge SHEFFEY, or any other officer denounced by the constitutional amendment, are set at rest. All acts of all such officers are acts of officers *de facto*, and therefore are good and valid acts.

I have argued the case so far on the hypothesis that Judge SHEFFEY was in fact and in law rendered ineligible to office on July 28, 1868, and has ever since held office in defiance of law ; and I have shown that even if he be disqualified for every cause known to the constitution and laws of Virginia or of the United States, if he be an alien, has fought a duel, be a non-resident, over or under the legal age, and in addition to all of these disqualifications, all of which he unites in his own proper person, he is disfranchised by the constitutional amendment, still, all his acts are good, valid and binding, and can never be challenged or questioned by reason of his said numerous disqualifications.

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It is argued that the adoption of the constitutional amendment operates like a judgment of ouster on a *quo warranto* by a court of competent jurisdiction ; and that, therefore, from the moment it goes into effect, no person disfranchised by it can hold office *colore officii*, or can be an officer *de facto*.

This would be true if the individual to which it was to be applied were designated and named in the article itself. It would doubtless be competent for the sovereign power to convict and punish individuals by name, without trial ; but then like an act of attainder it must name those individuals. Where a party is so specially attainted, the law operates at once on him like a judgment of an ordinary court. But until he is selected and condemned by name by due process of law, no judgment can have effect as against him. He must be personally condemned by an act of sovereignty like a constitutional amendment, or by a judgment of a court after trial and conviction.

While, therefore, it may be true that a party condemned by a judge, ousted by name from office by a constitutional amendment, would be deprived of his liberty contrary to the Constitution of the United States, it is clear that, until a judge is thus ousted by name, either by a sovereign act of attainder without trial, or by a conviction after trial, his holding office is still *colore officii*, and his acts those of a judge *de facto*.

The constitutional amendment is a general act of attainder—a statute denouncing a general penalty for crime.

The penalty applies to every person who is guilty ; but his guilt can only be ascertained, the identity of the individual can only be made certain, the penalty applied to that particular individual, only by due process of law—*i. e.*, trial, conviction and judgment. It might be competent for a constitutional amendment to declare that A. B. had been guilty of murder, and should be

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hung. In such case, the conviction of that individual would be final. But when it declares that all persons guilty of murder shall be hung, that penalty can only be applied to individuals according to law. Each person, before being hung, must be tried, convicted and adjudged that that particular penalty shall apply to him.

The constitutional amendment only differs from a penal statute in this, that being *ex post facto*, it could only have become law by becoming part of the constitution. No other authority but the sovereign power could enact it. It is, therefore, an *ex post facto* law—legal only because part of the constitution. But its provisions are general, like every penal statute denouncing a general penalty, which general penalty can only be applied to each particular case by due course of law, trial, conviction and judgment.

No officer, therefore, holding office, who is in fact ineligible under the constitutional amendment, can be affected by it until its provisions are applied to him according to law, nor can his holding be contrary to the constitution until such application is legally made.

So it is clear that the constitutional amendment does not affect officers now in office. Future Federal legislation may provide the mode of bringing it to operate on this class, but acting *proprio vigore*, it does not affect them.

The deprivation of office is a punishment of the highest class. Taking that from a man which he has and enjoys, and is entitled to, and is in possession of, may be done as a punishment; but then it must be done according to law.

Garland's case in the Supreme Court settled the law that test oaths were unconstitutional so far as they went to deprive him of his office of attorney, being *ex post facto*, and operating so as to make the party convict himself. This being the law, it must follow that a man enjoying the office of judge can not be deprived of it

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except by due process of law. No man, under the Federal constitution, can be tried or convicted unless by a jury, and it is therefore clear that the only mode by which the fact that any person holding an office is within the constitutional amendment is by the verdict of a jury, on an indictment for aiding in rebellion. Aiding rebellion is a crime, and can only be proved for the purpose of punishing the party, by the oaths of two juries, by an indictment, a verdict, and a judgment. That is the only evidence that the law knows, or can know, of guilt or criminality.

That a party held an office, and took an oath to support the constitution, may be proved by the best evidence that can be had ; but that he aided the rebellion can only proved by the record of his conviction—where he was confronted with the witnesses against him, was heard by the jury in his defense, and enjoyed all those protections and rights which the laws secures to parties charged with crime. It is clear that the constitutional amendment can operate on no man holding office when it went into operation, until such party is duly convicted of aiding rebellion, and even then it will require some process by which he can be ousted. Whether this can be done by the imposition of a test oath or not, it is useless now to inquire. It is certain that no means of any kind are provided for putting the amendment into operation.

But further than this, it seems that Judge SHEFFEY is not in fact disfranchised. When he was in the legislature in 1849, the Code of 1819 was in operation ; and by it no oath was required of members of the legislature to support the Constitution of the United States. There is no proof in this cause that he ever took such an oath, and I am almost certain that, in point of fact, he never did take it. At any rate, it can not be presumed that he did take it when such tremendous criminal consequences are sought to be deduced from the taking of

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it. Being in office, every presumption is in favor of his being eligible. The burden of proof lies in those who charge his disqualification; and they must prove it. No presumption of law will make up for this deficiency of proof.

I have demonstrated :

1. That the only inquiry that can be made on the return to this writ is, whether the petitioner has, in the state court, been deprived of any Federal right.

2. That, admitting Judge SHEFFEY to be disqualified under the constitutional amendment, he was still acting as judge, *colore officii*, and was judge *de facto*, and that his presiding at the trial as judge in no way contravened any Federal right of the petitioner.

3. That therefore the petitioner must be remanded.

4. That Judge SHEFFEY, in fact, is not disfranchised under the constitutional amendment according to the proof in this cause.

5. That the only proof which is admissible of his aiding the rebellion is the record of his conviction in a court of competent jurisdiction.

6. That the constitutional amendment can not operate *proprio vigore* on persons holding office at the time of its adoption, but requires further action by Congress to prescribe the mode by which it can be applied to such persons.

These propositions are conclusive, and the party must be remanded.

He must, however, be remanded to the custody of the sheriff of Rockbridge county for another reason. Admitting even that his conviction is illegal, and is no conviction, still it appears by the return that he is charged on the oaths of twelve men with a felony committed in Rockbridge county. In any event, therefore, he must be remanded.

With him, *James Neeson*; *Thos. R. Bowden*, Attorney-General of Virginia.

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CHASE, Ch. J.—This is an appeal from an order of discharge from imprisonment made by the District Judge acting as a judge of the Circuit Court, upon a writ of *habeas corpus*, allowed upon the petition of Cæsar Griffin. The petition alleged unlawful restraint of the petitioner, in violation of the Constitution of the United States, by the sheriff of Rockbridge county, Virginia, in virtue of a pretended judgment rendered in the Circuit Court of that county by HUGH W. SHEFFEY, present and presiding therein as judge, though disabled from holding any office whatever by the fourteenth amendment of the Constitution of the United States. Upon this petition a writ of *habeas corpus* was allowed and served, and the body of the petitioner, with a return showing the cause of detention, was produced by the sheriff, in conformity with its command.

The general facts of the case, as shown to the District Judge, may be briefly stated as follows :

The Circuit Court of Rockbridge county is a court of record of the state of Virginia, having civil and criminal jurisdiction.

In this court, the petitioner, Cæsar Griffin, indicted in the County Court for shooting with intent to kill, was regularly tried, in pursuance of his own election ; and, having been convicted, was sentenced according to the finding of the jury, to imprisonment for two years, and was in the custody of the sheriff to be conveyed to the penitentiary, in pursuance of this sentence.

Griffin is a colored man ; but there was no allegation that the trial was not fairly conducted, or that any discrimination was made against him, either in indictment, trial, or sentence, on account of color. It was not claimed that the Grand Jury, by which he was indicted, or the Petit Jury, by which he was tried, was not in all respects, lawful and competent. Nor was it

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alleged that HUGH W. SHEFFEY, the judge who presided at the trial, and pronounced the sentence, did not conduct the trial with fairness and uprightness.

One of the counsel for the petitioner, indeed, upon the hearing in this court, pronounced an eulogium upon his character, both as a man and as a magistrate, to deserve which might well be the honorable aspiration of any judge.

But it was alleged and was admitted that Judge SHEFFEY, in December, 1849, as a member of the Virginia House of Delegates, took an oath to support the Constitution of the United States, and also that he was a member of the legislature of Virginia in 1862, during the late rebellion, and as such voted for measures to sustain the so-called Confederate States in their war against the United States; and it was claimed in behalf of the petitioner, that he thereby became, and was at the time of the trial of the petitioner, disqualified to hold any office, civil or military, under the United States, or under any state, and it was specially insisted that the petitioner was entitled to his discharge upon the ground of the incapacity of SHEFFEY, under the fourteenth amendment, to act as judge and pass sentence of imprisonment. Upon this showing and argument, it was held by the District Judge that the sentence of Cæsar Griffin was absolutely null; that his imprisonment was in violation of the Constitution of the United States, and an order for his discharge from custody was made accordingly.

The general question to be determined on the appeal from this order is whether or not the sentence of the Circuit Court of Rockbridge county must be regarded as a nullity because of the disability to hold any office under the state of Virginia, imposed by the fourteenth amendment, on the person, who, in fact, presided as judge in that court. It may be properly borne in mind that the disqualification did not exist at

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the time that SHEFFEY became judge. When the functionaries of the state government existing in Virginia at the commencement of the late civil war took part, together with a majority of the citizens of the state, in rebellion against the government of the United States, they ceased to constitute a state government for the state of Virginia, which could be recognized as such by the National Government. Their example of hostility to the Union, however, was not followed throughout the state. In many counties, the local authorities and majority of the people adhered to the National Government; and representatives from these counties soon after assembled in convention at Wheeling, and organized a government for the state. This government was recognized as the lawful government of Virginia by the executive and legislative departments of the National Government; and this recognition was conclusive upon the judicial department. The government of the state thus recognized was in contemplation of law the government of the whole state of Virginia, though excluded, as the government of the United States was itself excluded, from the greater portion of the territory of the state. It was the legislature of the reorganized state which gave the consent of Virginia to the formation of the state of West Virginia. To the formation of that state, the consent of its own legislature, and of the legislature of the state of Virginia, and of Congress, was indispensable. If either had been wanting, no state, within the limits of the old, could have been constitutionally formed; and it is clear that if the government instituted at Wheeling was not the government of the whole state of Virginia, no new state has ever been constitutionally formed within her ancient boundaries. It can not admit of question, then, that the government which consented to the formation of the state of West Virginia, remained in all national relations the government of

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Virginia, although that event reduced to very narrow limits the territory acknowledging its jurisdiction, and not controlled by insurgent force. Indeed, it is well known historically that the state and the government of Virginia, thus organized, was recognized by the National Government. Senators and representatives from the state occupied seats in Congress, and when the insurgent force which held possession of the principal part of the territory was overcome, and the government recognized by the United States was transferred from Alexandria to Richmond, it became in fact what it was before in law, the government of the whole state. As such it was entitled, under the constitution, to the same recognition and respect, in national relations, as the government of any other state.

It was under this government that HUGH W. SHEFFEY was, on February 22, 1866, duly appointed judge of the Circuit Court of Rockbridge county, and he was in the regular exercise of his functions as such when Griffin was tried and sentenced.

More than two years had elapsed after the date of his appointment, when the ratification of the fourteenth amendment, by the requisite number of states, was officially promulgated by the Secretary of State, on July 28, 1868. That amendment, in its third section, ordains that "no person shall be a senator or representative in Congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

And it is admitted that the office held by Judge

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SHEFFEY, at the time of the trial of Griffin, was an office under the state of Virginia, and that he was one of the persons to whom the prohibition to hold office pronounced by the amendment applied.

The question to be considered, therefore, is whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power.

One of the counsel for the petitioner suggested that the amendment must be construed with reference to the act of 1867, which extends the writ of *habeas corpus* to a large class of cases in which the previous legislation did not allow it to be issued. And it is proper to say a few words on this suggestion here.

The judiciary act of 1789 expressly denied the benefit of the writ of *habeas corpus* to prisoners not confined under or by color of the authority of the United States. Under that act, no person confined under state authority could have the benefit of the writ. Afterwards, in 1833 and 1842, the writ was extended to certain cases specially described, of imprisonment under state process ; and in 1867, by the act to which the counsel referred, the writ was still further extended "to all cases where any person may be restrained of liberty in violation of the constitution, or of any treaty or law of the United States." And the learned counsel was doubtless correct in maintaining, that without the act of 1867, there would be no remedy by *habeas corpus* in the case of the petitioner, nor indeed in any case of imprisonment in violation of the Constitution of the United States, except in the possible case of an imprisonment, not only within the provisions of this act, but also within the provisions of some one of the previous acts of 1789, 1833, and 1842.

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But if, in saying that the amendment must be construed with reference to the act, the counsel meant to affirm that the existence of the act throws any light whatever upon the construction of the amendment, the court is unable to perceive the force of his observation. It is not pretended that imprisonment for shooting, with intent to kill, is unconstitutional, and it will hardly be affirmed that the act of 1867 throws any light whatever upon the question, whether such imprisonment, in any particular case, is unconstitutional. The case of unconstitutional imprisonment must be established by appropriate evidence. It can not be inferred from the existence of a remedy for such a case. And, surely, no construction, otherwise unwarranted, can be put upon the amendment more than upon any other provision of the constitution, to make a case of violation out of acts which otherwise must be regarded as not only constitutional, but right.

We come, then, to the question of construction. What was the intention of the people of the United States in adopting the fourteenth amendment? What is the true scope and purpose of the prohibition to hold office contained in the third section?

The proposition maintained in behalf of the petitioner, is, that this prohibition, instantly, on the day of its promulgation, vacated all offices held by persons within the category of prohibition, and made all official acts, performed by them, since that day, null and void.

One of the counsel sought to vindicate this construction of the amendment, upon the ground that the definitions of the verb "to hold," given by Webster in his Dictionary, are "to stop; to confine; to restrain from escape; to keep fast; to retain;" of which definitions, the author says that "to hold rarely or never signifies the first act of seizing or falling on, but the act of retaining a thing when seized on or confined."

The other counsel seemed to be embarrassed by the

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difficulties of this literal construction, and sought to establish a distinction between sentences in criminal cases, and judgments and decrees in civil cases. He admitted, indeed, that the latter might be valid when made by a court held by a judge within the prohibitive category of the amendment ; but insisted that the sentence of the same court in criminal cases must be treated as nullities.

The ground of the distinction, if we correctly apprehend the argument, was found in the circumstance that the act of 1867 provided a summary redress to the latter class of cases ; while in the former, no summary remedy could be had, and great inconvenience would arise from regarding decrees and judgments as utterly null and without effect.

But this ground of distinction seems to the court unsubstantial. It rests upon the fallacy already commented on. The amendment makes no such distinction as is supposed. It does not deal with cases, but with persons. The prohibition is general. No person in the prohibitive category can hold office. It applies to all persons, and to all officers under the United States, or any state. If upon a true construction, it operates as a removal of a judge, and avoids all sentences in criminal cases, pronounced by him after the promulgation of the amendment, it must be held to have the effect of removing all judges and officers, and annulling all their official acts after that date.

The literal construction, therefore, is the only one upon which the order of the learned District Judge, discharging the prisoner, can be sustained ; and was, indeed, as appears from his certificate, the construction upon which the order was made. He says expressly, "the right of the petitioner to his discharge appeared to me to rest solely on the incapacity of the said HUGH W. SHEFFEY to act (that is, as judge), and so to sentence the prisoner under the fourteenth amendment."

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Was this a correct construction ?

In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument, it is true, can not prevail over plain words or clear reason. But, on the other hand, a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petition.

The amendment applies to all the states of the Union, to all offices under the United States or under any state, and to all persons in the category of prohibition, and for all time present and future. The offenses, for which exclusion from office is denounced, are not merely engaging in insurrection or rebellion against the United States, but the giving of aid or comfort to their enemies. They are offenses not only civil but of foreign war.

Now, let it be supposed that some of the persons, described in the third section, during the war with Mexico, gave aid and comfort to the enemies of their country, and, nevertheless, held some office on July 28, 1868, or subsequently.

Is it a reasonable construction of the amendment which will make it annul every official act of such an officer? But, let another view be taken. It is well known that many persons, engaged in the late rebellion, have emigrated to states which adhered to the National Government, and it is not to be doubted that not a few among them, as members of Congress, or officers of the United States, or as members of state legislatures, or as executive or judicial officers of a state, had before the war taken an oath to support the Constitution of the United States. In their new homes,

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capacity, integrity, fitness, and acceptability, may very possibly have been more looked to than antecedents. Probably some of these persons have been elected to office in the states which have received them.

It is not unlikely that some of them held office on July 28, 1868. Must all their official acts be held to be null under the inexorable exigencies of the amendment?

But the principal intent of the amendment was, doubtless, to provide for the exclusion from office, in the lately insurgent states, of all persons within the prohibitive description.

Now, it is well known that before the amendment was proposed by Congress, governments acknowledging the constitutional supremacy of the National Government had been organized in all these states. In some, these governments had been organized through the direct action of the people, encouraged and supported by the President, as in Tennessee, Louisiana, and Arkansas, and in some through similar action in pursuance of executive proclamations, as in North Carolina, Alabama, and several other states. In Virginia, such a state government had been organized as has been already stated, soon after the commencement of the war; and this government had been fully recognized by Congress, as well as by the President.

This government, indeed, and all the others, except that of Tennessee, were declared by Congress to be provisional only.

But, in all these states all offices had been filled, before the ratification of the amendment, by citizens who, at the time of the ratification, were actively engaged in the performance of their several duties. Very many, if not a majority of these officers, had, in one or another of the capacities described in the third section, taken an oath to support the constitution, and had afterwards engaged in the late rebellion; and most, if not all of them continued in the discharge of their func-

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tions after the promulgation of the amendment, not supposing that by its operation their offices could be vacated without some action of Congress.

If the construction now contended for be given to the prohibitive section, the effect must be to annul all official acts performed by these officers. No sentence, no judgment, no decree, no acknowledgment of a deed, no record of a deed, no sheriff's or commissioner's sale—in short no official act—is of the least validity. It is impossible to measure the evils which such a construction would add to the calamities which have already fallen upon the people of these states.

The argument from inconveniences, great as these, against the construction contended for, is certainly one of no light weight.

But there is another principle which, in determining the construction of this amendment, is entitled to equal consideration with that which has just been stated and illustrated. It may be stated thus: Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the Constitution.

And here it becomes proper to examine somewhat more particularly the character of the third section of the amendment.

The amendment itself was the first of the series of measures proposed or adopted by Congress with a view to the reorganization of state governments acknowledging the constitutional supremacy of the National Government, in those states which had attempted to break up their constitutional relations with the Union, and to establish an independent Confederacy.

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All citizens who had, during its earlier stages, engaged in or aided the war against the United States, which resulted inevitably from this attempt, had incurred the penalties of treason under the statute of 1790.

But, by the act of July 17, 1862, while the civil war was flagrant, the death penalty for treason, committed by engaging in rebellion, was practically abolished. Afterwards, in December, 1863, full amnesty, on conditions which now certainly seem to be moderate, was offered by President Lincoln, in accordance with the same act of Congress ; and after organized resistance to the United States had ceased, amnesty was again offered in accordance with the same act by President Johnson, in May, 1865. In both these offers of amnesty extensive exceptions were made.

In June, 1866, little more than a year later, the fourteenth amendment was proposed ; and was ratified in July, 1868. The only primitive section contained in it is the third, now under consideration. It is not improbable that one of the objects of this section was to provide for the security of the nation and of individuals, by the exclusion of a class of citizens from office ; but it can hardly be doubted that the main purpose was to inflict upon the leading and most influential characters who had been engaged in the rebellion, exclusion from office as a punishment for the offense.

It is true that in the judgment of some enlightened jurists, its legal effect was to remit all other punishment. And such certainly was its practical effect, for it led to the general amnesty of December 25, of the same year, and to the order discontinuing all prosecutions for crime, and proceedings for confiscation originating in the rebellion. But this very effect shows distinctly its primitive character.

Now it is undoubted that those provisions of the Constitution which deny to the legislature power to

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deprive any person of life, liberty, or property, without due process of law, or to pass a bill of attainder or an *ex post facto*, are inconsistent in their spirit and general purpose with a provision which, at once without trial, deprives a whole class of persons of offices held by them, for cause, however grave. It is true that no limit can be imposed on the people when exercising their sovereign power in amending their own constitution of government. But it is a necessary presumption that the people in the exercise of that power, seek to confirm and improve, rather than to weaken and impair the general spirit of the Constitution.

If there were no other grounds than these for seeking another interpretation of the amendment than that which we are asked to put upon it, we should feel ourselves bound to hold them sufficient.

But there is another and sufficient ground, and it is this, that the construction demanded in behalf of the petitioner, is nugatory except for mischief.

In the language of one of the counsel, "the object had in view by us is not to unseat HUGH W. SHEFFEY, and no judgment of the court can effect that." Now the object of the amendment is to unseat every officer, whether judicial or executive, who holds civil or military office in contravention of the terms of the amendment. Surely a construction which fails to accomplish the main purpose of the amendment, and yet necessarily works the mischief and inconveniences which have been described, and is repugnant to the first principles of justice and right embodied in other provisions of the Constitution, is not to be favored, if any other reasonable construction can be found.

Is there, then, any other reasonable construction? In the judgment of the court there is another, not only reasonable, but very clearly warranted by the terms of the amendment, and recognized by the legislation of Congress. The object of the amendment is to exclude

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from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the Constitution or in an act of Congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable ; and these can only be provided for by Congress.

Now, the necessity of this is recognized by the amendment itself, in its fifth and final section, which declares that " Congress shall have power to enforce, by appropriate legislation, the provision of this article."

There are, indeed, other sections than the third, to the enforcement of which legislation is necessary ; but there is no one which more clearly requires legislation in order to give effect to it. The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these two sections. And the final clause of the third section itself is significant. It gives to Congress absolute control of the whole operation of the amendment. These are its words: " But Congress may, by a vote of two-thirds of each House, remove such disability." Taking the third section then, in its completeness with this final clause, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in proper cases by a two-thirds vote, and to be made operative in other cases by the legislation of Congress in its ordinary course. This construction gives certain effect to the undoubted intent of the amendment to insure the exclusion from office of the desig-

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nated class of persons, if not relieved from their disabilities, and avoids the manifold evils which must attend the construction insisted upon by the counsel for the petitioner.

It results from the examination that persons in office by lawful appointment or election before the promulgation of the fourteenth amendment, are not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section ; but that legislation by Congress is necessary to give effect to the prohibition, by providing for such removal. And it results further that the exercise of their several functions by these officers, until removed in pursuance of such legislation, is not unlawful.

The views which have been just stated receive strong confirmation from the action of Congress and of the executive department of the government. The decision of the District Judge, now under revision, was made in December, 1868, and two months afterwards, in February, 1869, Congress adopted a joint resolution entitled "a resolution respecting the provisional governments of Virginia and Texas." In this resolution it was provided that persons, "holding office in the provisional governments of Virginia and Texas," but unable to take and subscribe the test oath prescribed by the act of July 2, 1862, except those relieved from disability, "be removed therefrom ;" but a provision was added, suspending the operation of the resolution for thirty days from its passage.

The joint resolution was passed and received by the President on February 6, and not having been returned in ten days, became a law without his approval.

It can not be doubted that this joint resolution recognized persons unable to take the oath required, to which class belonged all persons within the description of the third section of the fourteenth amendment, as

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holding office in Virginia at the date of its passage, and provided for their removal from office.

It is not clear whether it was the intent of Congress that this removal should be effected in Virginia by the force of the joint resolution itself, or by the commander of the first military district. It was understood by the executive or military authorities as directing the removal of the persons described, by military order. The resolution was published by command of the General of the Army for the information of all concerned, March 22, 1869. It had been previously published by direction of the commander of the first military district, accompanied by an order, to take effect on March 18, 1869, removing the persons described from office. The date at which this order was to take effect, was afterwards changed to March 21.

It is plain enough from this statement that persons holding office in Virginia, and within the prohibition of the fourteenth amendment, were not regarded by Congress, or by the military authority, in March, 1869, as having been already removed from office.

It is unnecessary to discuss here the question whether the government of Virginia, which seems to have been not provisional, but permanent, when transferred from Alexandria to Richmond, became provisional under the subsequent legislation of Congress, or to express any opinion concerning the validity of the joint resolution, or of the proceedings under it. The resolution and proceedings are referred to here only for the purpose of showing that the amendment had not been regarded by Congress or the Executive, so far as represented by the military authorities, as effecting an immediate removal of the officers described in the third section.

After the most careful consideration, therefore, I find myself constrained to the conclusion that HUGH

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W. SHEFFEY had not been removed from the office of Judge at the time of the trial and sentence of the petitioner; and that the sentence of the Circuit Court of Rockbridge county was lawful.

In this view of the case, it becomes unnecessary to determine the question relating to the effect of the sentence of a judge *de facto*, exercising the office with the color, but without the substance of right. It is proper to say, however, that I should have no difficulty in sustaining the custody of the sheriff, under sentence of a court held by such a judge.

Instructive argument and illustration of this branch of the case might be derived from an examination of those provisions of the Constitution ordaining that no person shall be a Representative or Senator, or President, or Vice-President, unless having certain pre-prescribed qualifications. These provisions, as well as those which ordain that no Senator or Representative shall, during his term of service, be appointed to any office under the United States, under certain circumstances, and that no person holding any such office shall, while holding such office, be a member of either House, operate on the capacity to take office. The election or appointment itself is prohibited and invalidated; and yet no instance is believed to exist where a person has been actually elected, and has actually taken the office, notwithstanding the prohibition, and his acts, while exercising its functions, have been held invalid.

But it is unnecessary to pursue the examination. The cases cited by counsel cover the whole ground, both of principle and authority.*

This subject received the consideration of the Judges of the Supreme Court at the last term, with reference to this and kindred cases in this district, and I am au-

* Taylor v. Skinner, 2 So. Ca., 696; State v. Bloom, 17 Wis. 521; *Ex rel.* Ballou v. Bangs, 24 Ill. 184

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thorized to say that they unanimously concur in the opinion that a person convicted by a judge *de facto*, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, can not be properly discharged upon *habeas corpus*.

It follows that the order of the District Judge must be reversed, and that the petitioner must be remanded to the custody of the sheriff of Rockbridge county.

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DISTRICT OF SOUTH CAROLINA.

May, 1869.

HOWLAND ET ALS. v. KELLY.

An executor receives payment of a bond given before the war, in Confederate currency, on October 26, 1862. If liable at all, he is only liable for the value of the Confederate currency as of that date. In a suit against the obligor in the bond to cause him to deliver up the bond and pay it again, the executor is a necessary party.

Mrs. Monefeldt died in 1857, leaving a will in which she appointed a Mr. Jervey her executor, and made certain specific legacies. The will then directs, "The rest and residue of my estate, of whatever nature or kind the same may be, I do hereby direct my executor hereinafter named, or whoever may qualify on this my will, to convert into cash, and invest the same in such bonds or stocks as he may deem most advisable, and to divide the interest arising therefrom equally among my seven grandchildren, share and share alike (naming them), for their maintenance and support until the youngest grandchild living shall attain the age of twenty-one or marry. Then, I do hereby direct my said executor, or whoever qualifies on this my will, to divide the said estate among my said grandchildren, share and share alike."

Jervey qualified as executor, delivered the specific legacies, settled his accounts as executor, and reduced the residue of the estate to cash. Among these assets was a bond of Kelly, the defendant, for three thousand seven hundred and fifty dollars, with interest, payable in three annual installments from April 6, 1858, on which there was a balance of three thousand dollars

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due when he qualified as executor. Kelly paid to Jervey one thousand and twelve dollars and fifty cents, on account of principal and interest on this bond, April 12, 1859.

He paid on same account, April 27, 1860, two hundred and ten dollars; on April 27, 1861, he paid also two hundred and ten dollars interest due. On October 26, 1862, he paid Jervey in a check on the bank of South Carolina, the balance due, principal and interest, three thousand three hundred and thirty-five dollars and eighty-three cents, and the bond was delivered up to him. About the same time the mortgage given to secure this bond was entered, satisfied, and cancelled.

In 1868 the complainants filed their bill in this court, stating the terms of Mrs. Monefeldt's will; that they were the grandchildren provided for in it; charging that Jervey, after paying debts and legacies, took the residue of the estate as trustee for their benefit; that he had accounted for and distributed to them all the funds except this bond of Kelly's, which he claimed to have been discharged by Kelly in Confederate treasury notes, and he offered to give them Confederate bonds as representing the money paid by Kelly.

They charged that they were, and had been during the war, residents of the states adhering to the Federal government, and beyond the Confederate lines, so that no communication could have been had with them; that some of them were minors, one a *feme covert*; that these facts were known to Jervey and Kelly, and that therefore they both knew the pretended payment of this good debt in worthless currency was against the wishes and interest of Jervey's *cestui que trusts*, the complainants.

The bill alleged that Jervey had settled his whole trust except this bond of Kelly's; that therefore it was unnecessary to make Jervey a party, and it prayed that Kelly might be decreed to return the bond and to pay it.

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To this bill Kelly answered, denying any knowledge of Jervey's trust, or that complainants lived out of the state or beyond Confederate lines, and claimed that his payment was a good one, being made in good faith; and he demurred to the bill, because of the non-joinder of Jervey. The cause was heard on this demurrer.

McGrath & Lowndes, for complainant.

Porter, for respondent.

CHASE, Ch. J.—The executor who took the bond is a necessary party in this case. The bond was taken by Mr. Jervey as trustee or executor, and received for the benefit of the grandchildren of Mrs. Monefeldt.

The property was to be divided among the children when they became of age. That event did not take place until the year 1866. It then became the duty of the executor to divide the estate. The proceeds of the bond were not distributed because the executor had received payment in Confederate currency.

The most that could be said of this would be, that the executor is accountable for the value of the Confederate currency at the time it was received.

It also appears that the bond had been received from Mr. Gray, master in equity, and was secured by a mortgage upon property in King street. The object of this proceeding is to obtain control of this property for distribution, and to accomplish that all the parties interested must be brought before the court. The executor is a necessary party. The demurrer must be sustained, and the complainants have leave to amend their bill by joining the necessary parties, on payment of the costs of the term.

Statement of the Case.

PERRIN v. EPPING.

The United States marshal is compensated for his official service by fees, and can not lawfully rent any building in his custody, except under order of the court.

If he rents such property without authority, he is responsible in damages for any injury done to it in consequence.

Statement of the Case.

The plaintiff in this cause had a mortgage on a building in Beresford street, and instituted proper proceedings to foreclose the same, in the course of which, after the decree of foreclosure, the house was taken possession of by the defendant, as marshal of this court, in order to hold it until the day of sale.

The marshal rented the building to a large number of negroes,—some twenty or thirty of them, who occupied the rooms, six in number,—and, as the plaintiff alleged, injured it so as greatly to impair its value at the sale.

The house was sold under the decree of foreclosure, and the marshal's bill for fees and costs paid under protest, among the costs being a charge of two dollars per day for taking care of this very house.

Thereupon the plaintiff brings this suit against the marshal. He offered evidence to prove the facts as above stated, and, in addition, that the negroes had greatly damaged the house, had in fact almost torn it to pieces, and that the proceeds of sale were not near enough to pay the mortgage and also the fees and costs.

The defendant, on the other side, offered evidence to

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prove that when he took charge of the building it was in a very dilapidated condition, very much out of repair, and required some one to live in it to prevent still further destruction. That believing it to be for the best interests of the mortgage creditor and mortgagor also, and for the benefit of the property, he rented it out to some negroes who were the most respectable people he could get to live in such a house, and to take charge of it, and that it was not injured by those tenants.

Porter & Conner, for plaintiff.

Simonton & Barker, for defendant.

CHASE, Ch. J.—Gentlemen of the jury, there is very little in this case except a simple question of fact. The marshal is compensated for his official services by fees, and can not lawfully rent any building in his custody, except under the order of the court.

If the evidence in this case satisfies you that he did so rent the building in question, and that in consequence of such renting damages were sustained by the plaintiff, it will be your duty to render a verdict accordingly.

The evidence is conflicting. It is your business, gentlemen, to sift it. The amount of damages, if you find that any has been caused by the act of the defendant, is for your determination.

The jury returned into court with a verdict for plaintiff of \$800 damages.

DISTRICT OF SOUTH CAROLINA.

May Term, 1869.

BALDWIN v. LAMAR.

A verdict having been obtained in 1860, no further proceedings are had in the cause until 1867. In the meantime the record has been destroyed. The plaintiff may file a transcript of the record in his possession, upon which a judgment may be entered as upon the original record.

In such case, the defendant having died in the meantime, his personal representative must be made a party, and a rule served to show cause why the transcript should not be filed, does not operate to make him a party.

It seems that when the personal representative is a non-resident, it should be done by *scire facias*.

The copy of the record produced, was in the possession of the plaintiff.

Chamberlain & Seabrook, for plaintiff.

Magrath & Loundes, for defendant.

The facts are fully stated in the opinion of the Chief Justice.

CHASE, Ch. J.—This was originally a suit on which a verdict was obtained May 9, 1859, by the plaintiff against the defendant, for twenty-five thousand three hundred and fifty dollars. On motion, this verdict was set aside, and a new trial was ordered. On May 18, 1860, another verdict was rendered against the defendant, for fourteen thousand six hundred and sixty-six dollars and sixty-six cents. On June 4, the time for

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filing the bill of exceptions was extended for two months. On August 8, the time for filing exceptions was again extended to November 1, 1860.

The civil war, which soon followed, prevented any further action at that time. On February 13, 1867, the plaintiff proposed to file a transcript of the proceedings of the Circuit Court in this case, and also in the case of Baldwin v. C. A. L. Lamar, and others. A rule was issued upon the administratrix Lamar, to show cause why the order prayed for should not be made. The rule was duly served and returned, and on May 21, 1867, the order was made and the transcript filed. A motion is now made for a judgment upon the verdict evidenced by this record. The statute of the state, which has been practically adopted as the rule of proceeding in this court, provides that the transcript of a record lost or abstracted, when proved and filed, shall have precisely the same effect as if the record had never been disturbed. The question, then, is: What would be the right of the plaintiff in the verdict, obtained in May, 1860, had it remained on the record of the court during the whole period, and now, for the first time, a judgment was asked upon it? Undoubtedly a judgment ought to be entered upon the verdict; but it can not be entered *nunc pro tunc*. The accidents and events of the war must be regarded as causing inevitable delay. A judgment will only be rendered when asked. The plaintiff would be entitled to a judgment at this term, if this was all. But Lamar, the defendant, has been dead four years. The plaintiff appears to have taken for granted that the issue of the rule to show cause why the order to file the transcript should not be entered, made the administratrix a party to this record. We do not think so. We think that the record stands precisely as it would stand if there had been no war, and this was the next term after the verdict. If Mr. Lamar had died after the rendition of the verdict, before judgment could be entered,

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it would then be necessary to make the administratrix a party. This could be done in various ways, according to circumstances. It could be done on motion, or by a rule to show cause, or by a *scire facias*; and we think a *scire facias* should be issued in this case especially; the administratrix is not a citizen of this state, and it is proper that she should have the opportunity of pleading to the *scire facias*. We do not know that any plea will avail her. We do not propose to go into an examination of any question of jurisdiction or other defense in advance. The case was transferred to this court from the Circuit Court for the district of Georgia. We have been asked to make an order for re-transfer. No such order will now be made, but the case will be continued in order that the administratrix of the deceased defendant may be made a party to the record.

Statement of the Case.

DISTRICT OF SOUTH CAROLINA.

June Term, 1869.

PERDICARIS v. THE CHARLESTON GASLIGHT COMPANY.

It is settled law that all acts of the Confederate government, or the government of a state hostile to the United States, and prejudicial to the rights of citizens of states adhering to the union, are void and convey no title.

The sequestration acts of the Confederate States, and all acts under them, injurious to citizens of Union adhering states, are null and void, and a court of equity will decree such relief in the premises as may be necessary.

Where stock has been sold by a Confederate receiver, and new certificates therefor issued to the purchaser, and after the war is ended, such sale is admitted by the company to have been void, and it recognizes the original stockholder, but neglects to take any step to have the certificate issued under the Confederate sale declared void, cancelled or delivered up—in such case any stockholder has a clear equity to have such stock declared void, because it is a cloud on his title and injures the value of his stock.

When the company itself refuses or neglects to bring suit, then it is competent for such stockholder, in his own behalf and that of others in like situation with him, to file his bill in equity and invoke the assistance of the equity jurisdiction.

Statement of the Case.

Perdicaris, a citizen of a state adhering to the United States in the civil war, was a stockholder in the Charleston Gaslight Company.

During the war his stock was seized as that of an alien enemy, by virtue of an act of the Confederate congress for the sequestration of the property of such persons, and was duly sold under a decree of the District Court of the Confederate States for the district of South Carolina, by the receiver, as required by law.

The company thereupon, being required to do so by

Argument for Perdicaris.

the decree of condemnation, issued new certificates of stock to the purchasers under the sale, and transferred the stock from the name of Perdicaris to those of the purchasers; the sale was acknowledged by all parties, and the new stockholders recognized, participating in the government and profits of the corporation.

At the end of the war, however, when Perdicaris inquired as to the condition of the property he had left during the period he was prevented from visiting or communicating with Charleston, the company acknowledged him as the true owner of the stock, re-transferred it back to him, and refused to allow the holders of the stock issued under the sequestration sale to be recognized in any manner as stockholders.

After the lapse of four years, in which matters stood thus, Perdicaris filed his bill in the court, setting forth the facts and praying that the holders of this new stock be decreed to surrender it, and the company to cancel it, making the company and the holders of the new stock parties defendant to this bill. Part of the defendants filed a general demurrer, on which the cause was heard.

Rutledge & Young, for Perdicaris.

Effect of demurrer.

Being a general demurrer, the bill must be bad in every respect in order to be dismissed. If good in any respect, the bill must be sustained.

“Upon a general demurrer it is sufficient (for the complainant) to show that his complaint is to any extent right” (*Bagshaw v. Eastern R. Co.*, 7 *Harr.* 129).

“If any part of the bill is good, and entitles the complainant either to relief or discovery, a demurrer to the whole bill can not be sustained . . . and must be overruled” (5 *Johns. Ch.* 186; 1 *Id.* 433; *Living*

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ston v. Story, 9 *Peters*, 658; Griffing v. Gibb, 2 *Black*, 519).

Demurrer is sustained only whenever it is clear "it is an absolute, clear, and certain proposition, that taking all the charges of the bill to be true, it will be dismissed at the hearing" (quoted in substance); *Daniel, Ch. Prac. & Plead.*, 598-599; *Story Eq. Plead.* § 443, note 1; *Brooke v. Hewitt*, 3 *Ves.* 253).

Can Perdicaris sustain this suit?

It is clear the company could. The case of the New York and New Haven R. R. Co. v. Schuyler and about three hundred other defendants, shows this conclusively; also *Dodge v. Woolsey*, and numerous other cases. But this point is not disputed.

Can Perdicaris, a stockholder?

Perdicaris claims that his title is clouded, his stock lessened in value, &c., by these outstanding scrip, and the company will do nothing—has, at least, done nothing.

Clear that a corporator can sue his corporation.

General rule, then, is that none of the members or officers should be made parties, except where a discovery from them is necessary (*Daniel, ut supra*, 1 vol., p. 179, side page).

They (the officers of a corporation) should not be joined generally, where no discovery is sought from them, or where they can be used as witnesses (*Daniel, ut supra*, p. 180; *Story, Eq. Plead.*, § 235; *Howe v. Burt*, 5 *Mod. R.* 19).

The rule that the company should be plaintiff in cases such as the present is claimed by the demurrants to be, that when the object of the bill is to compel the ministerial officers of the company to account for a breach of official duty, then the general rule is that the suit should be brought in the name of the company (*Angell & Ames on Corporations*, § 312; *Robinson v. Smith*, 3 *Paige*, 233).

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This is not our case—we go against the company for a wrong act done by it. But admit we are against officers, what is the law in such case?

“As a Court of Equity never suffers a wrong to go unredressed for the sake of form merely, if it appear that the directors refuse by collusion with those who had made themselves responsible by their neglect, or if the corporation is still under the control of those who should be defendants in the suit, the stockholders, who are the parties in interest, will be permitted to file a bill making the corporation a party” (*Angell & Ames*, § 312; *Foss v. Harebottle*, 2 *Hare*, 491–492; *Bagshaw v. Eastern R. Co.*, 7 *Hare*, 114; *Robinson v. Smith*, 3 *Paige*, 233; *Dodge v. Wolsey*, 18 *How.* 331; *Hutchins v. Confens*, 4 *Russ.* 562).

Here directors who did the wrong act are directors still—a majority certainly.

The rule is also thus laid down, viz., that such a suit “should be brought in the name of the corporation, unless it appear that the directors refuse to prosecute, or are themselves the guilty parties answerable for the wrong. If they do thus refuse, or are thus answerable, the shareholders may sue in their own names; but in such a case, the corporation must be made a defendant either solely or jointly with the directors (*New York & New Haven R. R. Co. v. Schuyler*, 17 *N. Y.*, 596; *S. C.*, *Abbott's Practice R.* 58. Compare same case in 34 *New York*, where this point is sustained; the case in other respects was overruled).

Again we find: “Therefore though the result of the authorities clearly is that a corporation acting within the scope of, and in obedience to the provisions of its constitution, the will of the majority duly expressed at a legally constituted meeting must govern (*A. & A.*, § 380), yet beyond the limits of the act of incorporation, the will of the majority can not make an act valid, and the powers of a court of equity may be put in motion, at the

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instance of a single shareholder, if he can show that the corporation is employing its statutory powers for the accomplishment of purposes not within the scope of their institution (*A. & A.* § 393. Compare *Preston v. Grand Collier Dock Co.*, 11 *Simons*, 344).

When a bill was filed by a member of a numerous company v. the company, and members charging fraud in a certain transaction which had been confirmed by a note of the company and praying that it might be set aside, seven defendants demurred. The court overruled the demurrers, holding that it was the duty of the company and directors to do what the plaintiffs desired done, and that they (the plaintiffs) had a plain equity for relief, and overruled the demurrer (p. 347). He excluded all idea of fraud (p. 345. See also *Ward v. Society of Attorneys*, 1 *Collyer*, 370).

Bill filed by a few members against the company and its secretary alone, of one thousand three hundred and thirteen members, all had voted for the surrender of the charter and acceptance of a new one, and ordered a transfer of property to be held under new charter, twenty-one voted against this surrender, and filed their bill. The court granted an injunction.

The earlier cases do seem to establish the doctrine that the corporator can not file his bill against the ministerial officers of a corporation for an alleged breach of duty by them, without showing either that the directors refuse to file the bill in the name of the company, or that the company is still under the direction of those who should be made parties defendant.

Neglect is equivalent in effect to refusal, and it is axiomatic that it is sufficient to make the demand by bringing suit. The company in this case for four years have done nothing, and on the bill appear to be "willing to accede" to complainant's request, but that the purchaser at the sequestration sale holds its scrip; in

other words, the company does not think it proper that in changed circumstances it should repudiate its own apparent act, however done under a *vis major*, while it is perfectly competent for the complainant to do this himself.

But if the complainants' case is not under this exception, it certainly is under the second exception, according to the contention of demurrants. They insist that directors should be made parties, "should be defendants in the suit." Hence Perdicaris has the right to file this bill without seeking to put the company in motion, and only must amend by making directors parties.

But beyond and above all this, it will be noticed that in all the later cases, the right of the corporator to file his bill against the corporation solely, is allowed without dispute.

Not a word in any of these later cases is said about such a requisition. And in the case of the Society of Attorneys, not a director was made party, and yet an injunction, after much opposition, was granted.

But lastly on this point, the bill in the present case is not to call the directors, the ministerial officers, to an account for any breach of duty,—none is charged against them,—but to set aside the act of the company, an act sanctioned by the corporators in the South by acquiescence, since 1863. There is no claim that directors are liable (*A. & A.*, § 314).

Mere error in judgment is charged against the president. He obeyed the order of a court which had the power to send him to prison for disobedience. He did not go to prison,—did not make himself a martyr as he should and ought to have done,—even though living in this age so poor in martyrs.

CHASE, Ch. J.—The bill in this case was filed by the plaintiff in his own behalf and in behalf of any others

who might come in and contribute to the expenses of the suit. It is stated that the shares in the Charleston Gaslight Company's stock, belonging to the plaintiff and others, were sequestered under an act of the Confederate government and sold during the civil war. It is also stated that in lieu of those shares other shares of a corresponding amount were delivered to the purchasers, and the prayer of the bill is that the certificates thus issued may be declared to be invalid; that they may be ordered to be delivered up to be cancelled; that the defendants may be restrained from bringing suit for their transfer, and that the company may be restrained from allowing such transfer and from the payment of dividends. To this bill, there is a general demurrer filed by part of the defendants, and a motion to dissolve the injunction already granted. The only question in the case is, whether the parties are entitled to any relief in this court upon the case made by the bill. This question is twofold: first, whether the plaintiffs have a case of equity; second, whether this court has jurisdiction of the controversy between the plaintiff and defendants. It is not claimed that the transfer of shares sequestered and sold under the authority of the Confederate government conveyed exclusive title to the defendants. It has been repeatedly decided, both by the Circuit Courts and by the Supreme Court of the United States, that all acts of the Confederate government, or the government of a state hostile to the United States and prejudicial to the rights of citizens of states adhering to the Union, are void and convey no title.

Perdicaris is a citizen of an adjoining state. It is proper to add that the Gaslight Company has acted upon the principle just stated. It is true that it erased from the books the names of the original stockholders, whose stock was sold under the Sequestration Act and issued new certificates to the purchasers. But this was during the war. Since the war ended it has reinstated

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the names of the original stockholders, and recognized fully their right to dividends. The certificates issued to the purchasers from the Confederate receiver are, however, still outstanding. Perdicaris, as owner of original stock, claims the interposition of the court against the defendants, who in virtue of their purchases from the receiver, assert a claim to be recognized as stockholders upon an equality with himself. It is very clear that Mr. Perdicaris has a good case in equity. If the whole stock had belonged to stockholders residing in other states and had been sold under the Sequestration Act, and it can be maintained, after the war, that the purchasers are entitled to recognition equally with the original stockholders, it is very clear the value of the stock to the latter would be reduced just one-half. This shows very clearly the equity of Mr. Perdicaris. There is no way by which he can be relieved except by a court of equity. But it is insisted that the company itself should bring suit, and that Perdicaris, being only a stockholder, can not be heard in this court. We do not agree to this view. It is not denied that if the company had refused to institute proceedings, the stockholders might do so. There is no principle of equity administration which denies to a stockholder protection in a court of equity. It is true that the corporation represents the corporate interests, and in this case it would, perhaps, be most appropriate that the corporation should bring a suit for its own protection and for the protection of the rights of the original stockholders, but it has at least neglected and omitted to do so. Under such circumstances any stockholder may proceed. We think the bill filed in this case by the plaintiff for his own benefit and for the benefit of his co-stockholders is properly conceived, and that upon the case made by it the plaintiff is entitled to the relief asked. The demurrer must be overruled, and the motion to dissolve the injunction must be denied.

Statement of the Case.

McLEOD v. CALLICOTT.

June Term, 1869.

No agent of the U. S. Treasury Department under the Captured and Abandoned Property Act, was justified in receiving after June 30, 1865, any captured or abandoned property unless theretofore surrendered by Confederate agents or officers, much less making any seizure of unsurrendered property.

Property surrendered by the military authorities of the Confederate Government could not be released by any state or provost court.

A treasury agent, acting under color of the Captured and Abandoned Property Act, under which he is appointed, or under a mistaken sense of duty, can not be held responsible in a suit at law, or other personal proceeding.

The only remedy provided for the injured party is his right to prosecute his suit before the Court of Claims, within two years after the close of the war.

Statement of the Case.

During the civil war, the Congress of the United States, on March 12, 1863, passed a law known as "the Captured and Abandoned Property Act," which directed the Secretary of the Treasury to appoint certain agents, whose duties were to receive from the military officers and from private soldiers, all property captured by the forces of the United States within his agency.

They were also to take possession of property abandoned by its owners, and all property thus received was sold by them, and it was provided that the proceeds should be paid into the treasury. The act further provided that all citizens of the United States, who had remained loyal to the Government of the United States during the war, should have the right at

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any time within two years after the close of the war to file their petitions in the Court of Claims, and on furnishing proof of their loyalty, that court was authorized to order the proceeds of such property to be returned to them out of the treasury of the United States.

This being the law, and the war having practically terminated in May, 1865, the Secretary of the Treasury, on June 27, 1865, addressed a circular to those treasury agents charged with the duty of collecting captured or abandoned property, directing them to dispose of the property then on hand, and to refrain from receiving any more after the 30th inst.—except such as had been actually captured or surrendered by military or naval officers or agents of the Confederate States, and which had not been delivered before that day.

On July 27, 1868, the Congress passed another act declaring the intent of the several laws relating to captured and abandoned property, by which it declared that the true intent and meaning of those acts was that the remedy given before the Court of Claims, should be exclusive of all other remedies, and that the owner of any property taken as captured or abandoned by agents of the Treasury Department, in virtue or under color of said act, “should be precluded from suit at common law or any other mode of redress whatever, before any court or tribunal other than the Court of Claims.” Under these circumstances, Callicott being a supervising agent of the Treasury Department of the United States, under the Captured and Abandoned Property Act, operating in South Carolina, on October 21, 1865, seized and carried off thirty-nine bales of cotton belonging to the plaintiff, Alexander McLeod.

Thereupon McLeod made divers attempts to have his property restored to him. He took proceedings before the Provost Court, one of the military civil tribunals established in South Carolina by the military

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authority for this purpose, and failed, that tribunal adjudging that the seizure was proper, or that he had no remedy before it.

He then applied to the Secretary of the Treasury, who ordered a restoration of it, and Callicott refused to do so, unless a bond of indemnity should first be given to himself.

Thereupon, at the opening of this court in this district, this suit was brought,—an action of trespass to recover the value of the cotton, together with vindictive damages for the tort.

The defendant plead specially that what he did was as special supervising agent of the Treasury Department, acting by virtue and under color of the Captured Property Act, to this general replication.

On the trial the plaintiff proved the taking of the cotton on October 21, 1865, and its value. That Callicott had told the witness Townsend, that he knew he had no authority to take the cotton, and that he would return it to McLeod, if he would pay him two hundred dollars, or some such matter.

That a considerable correspondence had taken place between the plaintiff's counsel and Callicott, on the subject of a restitution of this cotton, in which they urged and argued the wrongfulness of the seizure, on the law and the facts, and on his refusing to restore it, they had made application to the Secretary of the Treasury, who eventually ordered its restitution. But that Callicott had suppressed in his report on the case to the department very material—the most material portions of this correspondence with counsel, and had refused to obey the order of the secretary unless the plaintiff gave him a bond to indemnify him from all future liability for his conduct. The defendant, on his part, proved and relied on the proceedings in the Provost Court as evidence of his *bona fides* in making the seizure, and as being the sentence of a court of compe-

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tent jurisdiction, which had adjudicated the rights between the parties in a suit before it, between the same parties, and about the same subject-matter.

J. B. Campbell, for plaintiff.

Corbin, U. S. District Attorney, for defendant.

CHASE, Ch. J.—Gentlemen of the jury, the District Attorney has asked for various instructions which the court will decline to give, not that we doubt the general correctness of most of the legal propositions contained in them, but we prefer to give you what we conceive to be the law in the case, in our own language, embodying the instructions asked, so far as we think them correct, in what we say. This is an action of trespass brought by Alexander McLeod against T. O. Callicott. The plaintiff alleges that thirty-nine bales of cotton belonging to him, were wrongfully taken by defendant and converted to his own use. The defendant pleads in justification, not denying the taking, but averring that what he did was done as special supervising agent of the Treasury Department of the United States, and in accordance with law. The plaintiff replies, denying the truth of this averment, and insisting that in what Callicott did he did not act as agent, but wrongfully and without justification in law. The pleadings present the issue which you are to try. First, did this cotton belong to Alexander McLeod, the plaintiff, in October, 1865? Was it his property at that date? And second, was the defendant justified in what he did by virtue of his office as supervising agent of the treasury? That the cotton belonged to the plaintiff, unless his title had been divested by capture, seems not to be questioned. The second question alone, therefore, is important. Under several acts of Congress, during the late war, supervising agents of the

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Treasury Department were appointed in the several insurgent states, and charged with certain specific duties. Among these duties was that of receiving from the military officers of the United States all property captured by them, with instructions to turn it over to the proper authorities, for sale and for account. In respect to citizens of the United States, who had maintained a loyal adherence to the government of the United States, it was provided by law that this property or proceeds should be returned to them upon making the necessary proofs in the Court of Claims, at any time within two years after the close of the rebellion. It is alleged, and not denied, that Callicott was supervising agent, and had the general authority. It was his duty to receive from military officers, and from private soldiers, all property captured by the forces of the United States, during the recent war, within his agency.

If this case depended on this general authority, the only question to be determined would be whether the cotton in question was captured property. But there is something more in this case. These supervising agents were appointed by the Secretary of the Treasury, under regulations approved by the President of the United States, and were subject in all respects to his direction and control; and the general regulations established had relation only to a state of war. Now, actual hostilities between the insurgent states and the United States terminated practically in May, 1865. In the state of South Carolina a provisional government was organized, under a proclamation of the President, in June or July of that year, and the Secretary of the Treasury, having reference to the changed condition of affairs, on June 27, 1865, addressed a circular to those treasury agents, in which he prescribed a rule for their government in the new state of things. (The chief justice here read the fourth section of the circular.) This section provides

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that officers "charged with the duty of receiving and collecting, or having in their possession or under their control, captured, abandoned, or confiscable personal property, will dispose of the same in accordance with regulations heretofore prescribed, and refrain from receiving such from military or naval authorities after the 30th instant." The general regulation which required Mr. Callicott to receive all captured property from officers of the United States was thus rescinded on June 27, 1865, with the following limitation: "This will not be considered as interfering with the operations of agents now engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records delivered to the United States military or treasury authorities by rebel military officers or cotton agents." The new regulation or prohibitory order, therefore, did not extend to property which had been captured or surrendered by military officers of the Confederate government to the United States. But with that exception the prohibition is complete and final, and no agent of the Treasury Department was justified in receiving, after June 30, 1865, any captured property, unless theretofore surrendered; much less was any such officer warranted in making any capture of unsurrendered cotton himself, after that date, with or without military aid. He had no authority to do so. All his powers, as we have said to you, were derived from the Treasury Department, and when the Treasury Department withdrew that general authority it was at an end. The question, then, in this case, is whether this was a part of the property which had been surrendered by the military authority of the Confederate government to the United States prior to June 27, 1865. You have heard all the evidence, and it is your province to determine whether or not this property was in that category. If it was, then it was Callicott's duty

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to receive it and transmit it to the authorities of the United States for sale, and the only remedy which the owner or claimant of the cotton could possibly have would be by application to the Court of Claims of the United States. The whole matter seems to be narrowed down to the simple proposition whether the evidence before you satisfies your minds that the cotton was included in the surrender referred to in the secretary's instructions of June 27. If it was so included, then the court charges you that neither the action of the Provost Court, relied on by the defendant, nor the action of any state court could withdraw it from that category without the consent of the United States. If it was on June 27 captured property, in this sense, that is, property surrendered by the military authorities of the Confederate government to the United States, then it remained captured property, and could not be released by the action of the Provost Court. That action, if intended to have this effect, was without sanction of law, and of no avail. If it was such property, it was the duty of the defendant to take possession of it; if not, his seizure was unlawful. But there is another question, not necessarily determined by the character of the property, on which it is the duty of the court to make some observations. By an act passed on July 27, 1868, Congress declared the intent of the several acts relating to captured property. Among these was the Abandoned or Captured Property Act of March 12, 1863, of which, as well as of the others, the true intent was declared to be that the remedy given in cases of seizure by preferring claims in the Court of Claims should be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property, in virtue "or under color of said act" from suit at common law or any other mode of redress whatever, before any court or tribunal other than the Court of Claims.

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It will be for you to say whether the defendant, in taking this property, proceeded under color of that act. If he was proceeding in good faith, believing himself to be warranted as the officer of the national government in taking charge of the cotton under that act, we think he is covered by its provisions. We adopt this view the more readily because in a subsequent part of the act it is provided that "in all cases in which suits of trespass" (which is this case) "may have been brought, or shall hereafter be brought, against any person for or on account of private property taken by such person as an officer of the United States, by virtue of any act relating to captured or abandoned property, and the defendant shall plead, or allege in bar thereof, that such act was done or omitted to be done by him as an officer of the United States, in the administration of one of the acts aforesaid, or in virtue or under color thereof, such plea or allegation, if the fact be sustained by proof, shall be deemed and adjudged in law to be a complete and conclusive bar to any such suit or action. It is our duty, under this act, to say to you that the plea of the defendant in this case is a conclusive bar to this action, if you find affirmatively that the acts of his complained of in the declaration were done by him in virtue or under color of any of the acts referred to. If it was done by him as supervisory or special agent, under a mistake as to the character of the property, he is in our judgment protected by this act. It would not protect the United States from a demand in the Court of Claims for this property, but it would protect the officer against a private suit, if he acted under color of this law, or under a mistaken sense of duty, though not in strict pursuance of the law. You have heard all the evidence, and it is for you to judge whether he acted under a sense of duty or not. You can weigh the whole evidence and determine that matter for yourselves.

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The only remaining point on which it is proper to instruct you is this:—It is claimed by counsel that in the event you should find for the plaintiff, you may assess what are called vindictive damages. The court can not say that to you. If you find for the plaintiff, it will be your duty to assess the value of the property at the time of the conversion, October 21, 1865, with lawful interest from that date.

The Chief Justice added:—If there is anything in the evidence which satisfies you that the defendant acted without any color of law, willfully and in flagrant disregard of his duty—then you have a right to assess vindictive damages. But it is for you to say whether there is anything of that sort in the proof.

The jury returned the following verdict:

We find for the plaintiff, eleven thousand seven hundred and sixty-eight dollars.

The defendant then moved for a new trial.

1. Because the finding of the jury was against the evidence.

2. Because it was against the law as laid down by the court.

On a subsequent day, the motion for the new trial having been argued by counsel, the court pronounced its opinion.

CHASE, Ch. J.—This is a motion for a new trial. The grounds assigned are that the verdict was contrary to the charge of the court. The court left to the jury the question of the good faith of Callicott as an officer of the government intending the honest exercise of his functions in the seizure of the cotton. We also left to the jury the question whether the cotton itself was part of that surrendered by the military authorities of the Confederate Government, upon the termination of hostilities.

Upon the second question, we think the finding was

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clearly right. It is not impossible that this cotton was in fact the property of the Confederate Government during the rebellion, and included in the surrender made by the Generals of the Confederate armies at the conclusion of hostilities. It is enough to say that no evidence to this effect was offered to the jury. But there was some of a contrary tendency.

It was, therefore, clearly a seizure unwarranted of law. The only question was whether Mr. Callicott was protected by his official character. We thought he was, if he was acting in good faith, in the exercise of his authority as supervising agent, though mistaken as to the character of the cotton. The question of good faith, of honest mistake, was left, and, we think, properly left to the jury. We thought that the evidence taken altogether warranted a verdict in favor of the defendant, and should have been quite satisfied had such a verdict been rendered.

We can not say that there was no evidence that warranted the conclusion of the jury. Townsend's statement, admitted by the District Attorney, was that Callicott told him that he knew he had no authority to make the seizure; that he was willing to take two hundred dollars or some such sum, and release the cotton. There was testimony also which showed an omission in Callicott's report to the Secretary of the Treasury of an important part of the correspondence between himself and the counsel of the defendant. And there was evidence also that when the whole matter had been submitted to the Secretary of the Treasury, and he had directed that the cotton should be released upon the defendant giving the usual certificate of probable cause, Callicott required, as an additional condition of release, a bond of indemnity to himself.

The jury might possibly have inferred, from all these things, that Callicott was not acting in good faith. We can not say that the conclusion was wrong.

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Upon the whole evidence, and we do not go into that in favor of the defendant, our conclusion was the other way. But the matter of fact was fairly left to the jury, and was peculiarly within their province.

We can not set aside their verdict because the jury did not agree with us as to the preponderance of the evidence.

The motion for a new trial will be overruled.

Statement of the Case.

LIVINGSTON v. JORDAN.

June Term, 1869.

No person has a right to intervene as a volunteer for a minor child, and make a contract for a sale of a minor's estate.

If such a volunteer has made such a contract, a Court of Equity afterwards has not jurisdiction to ratify it.

The courts of a state forming part of the Confederate States had no jurisdiction during the civil war over parties residing in states which adhered to the National government.

As between parties residing in South Carolina and parties residing in states adhering to the National government, the courts of South Carolina could have no jurisdiction while the war continued.

A party professing to act as *prochein ami* for infants resident in Maryland, applied to a Court of Equity of South Carolina to ratify a sale made by him of the real estate of the infants lying in South Carolina. The application was made in February, 1861.

The application was referred to the master, and proceedings were not finally terminated until April, 1862, when the sale was ratified, and subsequently the purchaser paid the purchase money in Confederate currency. The professed *prochein ami* was stepfather of the infants, and was as well as they resident in Maryland during the whole war. On the restoration of peace they repudiated the whole transaction, and brought ejectment for the land.

Held, that the proceedings before the South Carolina courts were void, as to them, and that they must recover.

Statement of the Case.

This was an action of ejectment to recover the premises described in the pleadings.

Mary S. Livingston (formerly McRa) and Julia M. McRa were entitled under the will of their grandfather to the Wateree plantation. Mary S. and Julia McRa were minors, living in Baltimore.

On February 12, 1861, Henry Cehrich, their *prochein ami*, filed his petition in the court of equity for Sumter

Plaintiff's points.

county, setting forth the contract for the sale of the plantation, the deposit with solicitor of petitioners of the cash portion, and praying confirmation of sale. This petition was referred to commissioner in equity, who reported on March 20, 1861, that Mary S. McRa had come of age; that Julia M. McRa was over eighteen years old, when according to the laws of Maryland as in evidence before the commissioner, the guardianship of female infant ceases. The report further recommended confirmation of sale.

A decretal order was made by the court, March 29, 1861, confirming the report and ordering the commissioner, on execution of bonds and mortgage for the credit portion, by the purchaser, to execute a deed of the property.

In April, 1862, the commissioner in equity reported that the purchaser had not executed the bonds as required by the decree, and further time was granted by the court, and on October 29, 1862, the purchaser complied, and the commissioner in equity executed to him a conveyance of the property.

The bonds, as they fell due, were paid in Confederate currency, and by an order of court invested in Confederate bonds. The cash portion was deposited by the solicitor in banks, and now lost. Subsequently the purchaser sold and conveyed the premises to the defendant.

Porter & Conner, for plaintiff.—I. There was no contract of sale, for infants could not contract, and there was no one authorized to contract for them. Sale of real estate of infants can only be effected through court of equity. Court will only act with the greatest precaution, and when sale is for manifest advantage of infant. Otherwise jurisdiction is liable to the most obvious abuse (*Pearse v. Killiam*, *McMullan's Eq.* 234; *Bulow v. Buckner*, *Richardson's Equity Cases*, 401).

Plaintiff's points.

Defendant relies on decree of court, but taking title under the court, he is bound at his peril to see that court had jurisdiction, and that proceedings were regular. The proceedings were irregular, and parties not properly before the court, and of course not bound by the decree. The petition is by H. Oehlrich, as next friend and guardian in Maryland. We object: 1. That petition is not signed or sworn to by next friend. 2. That next friend must reside in the state, so as to be within the control and reach of the court. 3. That it prays sale of real estate and payment of funds to guardians residing out of the state, a thing the court will not permit (2 *Daniel's Ch. Pr.* 100; 2 *Maddox Ch. Pr.* 375; *Ex parte* Copeland, *Rice's Eq.* 69). 4. That the evidence before the commissioner showed that the infants were over eighteen years; that the guardian was appointed under laws of Maryland, and that he was no longer guardian under laws of that state, and never had been appointed guardian under laws of South Carolina. The proceedings were not only irregular but were fatally defective. The only parties to be bound by the decree were not legally before the court. The petition was signed by no one but the solicitor who filed it. He was not appointed by any one authorized to act for or bind the infants. Even if any semblance of authority existed for the institution of the proceeding, it terminated as to Mary S. McRa three days after petition was filed, for she then came of age. And it terminated as to Julia McRa, March 6, 1862, when she came of age. In April, 1862, when commissioner in equity reported that purchaser had failed to comply with decree of court it was in evidence before the court that both infants had come of age. Any previous authority to represent them had expired. No new authority had been given. All subsequent proceedings were null and void. The only ground of jurisdiction, the infancy of the parties, had ceased. Tested by the established principles of equity

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the proceedings were unauthorized and invalid, the parties in interest never properly before the court, and the decree not binding upon them.

II. But even if the proceedings before the court had been regular and legal, and the solicitor had had authority to bind the parties at the inception of the suit, the war suspended his authority and suspended the jurisdiction of the court. The petitioners were alien enemies. There was no *persona standi in judicio*; "absolute suspension of the right, and prohibition to exercise it, exist during war by the law of nations" (Griswold v. Waddington, 16 *Johns.* 468.)

CHASE, Ch. J.—Gentlemen of the jury, this is an action of trespass upon the case to try title. There is very little in it for you to pass upon. The question of fact lies within a very narrow compass. The only question of importance in the case is a question of law.

It is very clear that this contract made between Mr. Moses and Mr. Robertson did not bind the plaintiffs. It was a contract without authority from them. No person has a right to intervene as a volunteer for a minor child, and make a contract for the sale of a minor's estate. This is so clear that it needs no argument. If, however, as apparently in this case, a person does intervene and make such a contract, it may become binding by subsequent assent of the parties on arriving at full age, or through proper proceedings in a court of equity.

There is no allegation in this case, that we have heard, of any such subsequent consent of these parties. You have heard the testimony of Chief Justice MOSES. He stated distinctly there was no intercourse between him and these minor children in relation to this contract. It was made solely at the instance of their mother and stepfather. So far as their consent goes, therefore, it may be laid out of the case. The next

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question is whether there is any jurisdiction in a court of equity of the state of South Carolina to make a decree confirming the contract, or for the sale of the minor's estate. Upon that point we entertain very serious doubts. Undoubtedly an infant may bring suit by next friend in a court of equity ; and the court has jurisdiction in such a suit to make an order giving authority to sell the estate of the infant. There is no question upon that point. In this case, however, the suit was brought by the stepfather, representing himself as next friend of the minors ; but he himself resides in Maryland, beyond the jurisdiction of the court in which the suit was brought. Though represented as the guardian of the minors, he was not such in fact. He had ceased to be the guardian of one under the laws of Maryland for more than two years, and of the other for nearly two. And one of the heirs became of age, according to the laws of South Carolina, within four days after the suit was brought, and the other long before the final decretal order under which the defendant claims title ; and neither was ever brought formally into court.

As we have already said, we doubt upon the question of jurisdiction ; but for the purposes of this case will rule that jurisdiction to confirm this contract made in behalf of the minors, or to pass the final decretal order under which the title was conveyed, did not exist. The defendant, if dissatisfied, may move in arrest of judgment, or for a new trial.

Under this ruling, gentlemen, your verdict must be for the plaintiff ; for, if there was no jurisdiction in the court, the defendant can not protect himself by its decree.

It is proper to say, further, that although we put this case, for the present, upon the absence of jurisdiction in the state court to confirm or order the sale, there is another objection to the defendant's title equally fatal.

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The jurisdiction of the state court over the plaintiffs, whatever it was, terminated when the civil war broke out. Upon that point we entertain no doubt. As between parties residing in the state of South Carolina, and parties residing in the states which adhered to the National government, between whom war made intercourse impossible, there could be no jurisdiction in the courts of South Carolina while the war continued, by which the rights of non-residents could be injuriously affected.

This ruling, indeed, applies only to the orders made during the war; it is decisive, however, of this case.

We charge you, gentlemen, that the courts of South Carolina had no jurisdiction of these plaintiffs, and no jurisdiction to make any order prejudicial to their rights during the war. These instructions, gentlemen, leave nothing for your determination but the question of damages. The measure of damages must be the amount of net profits made by the defendant from the plantation. The defendant in this case is Mr. Jordan, not the original purchaser, Mr. Robertson. If you have heard any evidence of profits made by him, you will give damages to that extent.

The jury returned a verdict for plaintiff, but gave no damages.

Statement of the Case.

DISTRICT OF SOUTH CAROLINA.

June Term, 1869.

ALSTON v. MANNING.

The practice of the state courts in relation to summoning juries, whether statutory or otherwise, does not become the practice of the United States courts until expressly adopted by the latter.

A jury was summoned according to what had for a long time been the practice of the courts, and the statutory requirements of the state of South Carolina. But before the summoning of the jury, those statutory requirements and the practice of the State Courts had been materially modified. The jury is properly summoned.

Statement of the Case.

Under the laws of South Carolina prior to 1861, the juries in the state courts were required to be white persons owning a certain amount of property.

The Circuit Court for the District of South Carolina made a rule regulating the summoning of juries in conformity with that law. This rule was modified subsequent to 1866, so as to strike out all distinctions on account of race or color, but retained the property qualification for jurors after the modification of the rule of court. The state of South Carolina passed an act in 1868, abolishing all distinctions on account of race, color, or property qualifications, as to jurors in the state courts, and provided a method of selecting them in each county, whites and blacks to be summoned in proportion to the population of the races in the respective counties.

The venire for the jury to this term of the Circuit Court ran in accordance with the modified rule of 1866,

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directing the sheriff to summon persons having the stated property qualifications, without regard to color.

On the return of the writ executed, and the assembling of the jury summoned under it, the defendant moved the court to continue the cause until the next term. 1. Because the rule of court under which the jury was summoned did not conform to the law of the state in existence at the time the rule was made, in that the law required white persons alone to be summoned, while the rule required them to be summoned without distinction on account of race or color. 2. Because the said rule did not conform to the law of the state in existence at the time the rule was executed. The state law having abolished property qualifications, while the rule maintained it.

CHASE, Ch. J.—The answer to the application for continuance, made in behalf of the defendant, must depend on the construction of the acts of Congress relating to juries.

If the proposition maintained by him is correct, that the jury now in attendance upon the court is not constituted in conformity with those laws, he can not be required to submit his cause to its determination.

The only act which it is now necessary to consider is that of July 20, 1840. This act provides that the qualifications and exemptions of jurors in the courts of the United States shall be the same as in the highest courts of the state in which trials by jury are held, and that they “shall be designated by ballot, lot or otherwise, in the mode practiced in such courts, as far as practicable, by the courts of the United States and their officers.”

The act of the state, in accordance with which was the mode of designating jurors practiced in the state courts when the jury now here was selected, was passed in 1859.

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The rule of this court conformed to that act as far as practicable. It had been modified only so far as to strike out distinction on account of color. It retained as the law of the state and the practice of the state courts, a property qualification.

It is not denied that the jury was constituted according to the law and practice of the state until last year. Then the property qualification was abolished; and later, within the last two or three months, a rule has been prescribed for the selection of juries in the several counties, from the white and colored voters in the proportion of their respective numbers. And the question is, did these late laws become at once the rule of this court so far as to make void the designation of the jury selected in conformity with the prior law and the existing rule? It is only necessary to look at the act of Congress to determine this question. That act does not make the acts of the state legislature alone, but those and the practice of the state courts the guides of the United States courts in this matter. That practice, of course, is presumed to be in conformity with these acts, and is most readily ascertained by reference to them. But neither the state law nor the state practice has instantaneous operation in the courts of the Union. The state practice can only be introduced as far as practicable, and rules are necessary to determine how far it is practicable, and to introduce it to that extent.

Accordingly the act provides that "the courts of the United States shall have power to make all necessary rules and regulations for conforming the designation and impanelling of juries, in substance, to the laws and usages now in force in such state."

This was done by the rule in conformity with which this jury was designated and impanelled. In order that future changes in state law and practice might be incorporated into the practice of the national courts, the act

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proceeds to provide: "And further shall have power, by rule, or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective states for the state courts."

Under this provision, this court has power to provide, and will doubtless recognize the duty of providing, by rule, for the future designation of juries in substantial conformity with the recent legislation. But, until some rule or order has been made to that effect, that legislation has, and under the act of Congress can have, no operation here.

It follows that the present jury was lawfully designated and impanelled, and is not affected by the legislation referred to.

The existing rule rejects distinction on account of color. The law now rejects, also, distinction on account of property. It will be the duty of the court to provide, by rule, for the selection of impartial, intelligent and upright—in one word, competent—jurors without regard to either of these adventitious distinctions.

The motion for continuance must be denied.

Subsequently, the following rules were adopted by the court, Ch. J. CHASE presiding:

To conform the manner of designating the juries, in substance, to the laws and usages now in force in the state of South Carolina, ordered,

1. That the clerk of the Circuit Court, and the Marshal of the United States for the District of South Carolina, do make up a jury list from the state at large, of three hundred names of citizens, qualified under laws of the state of South Carolina to serve in the highest courts of the state, in which juries are used, in the following manner, to wit: they shall call upon the several collectors of internal revenue of the several collection districts in the state of South Carolina to furnish each, from the several counties in their respective

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districts, the names of one hundred citizens, to be selected by them, and such as they think well qualified to serve as jurors, being persons of good moral character, sound judgment, and free from all legal exceptions. Provided, if any one of the said collectors of internal revenue shall, after thirty days' notice in writing, from the clerk and marshal, neglect or refuse to furnish the list of names as hereinbefore provided, then the clerk and marshal shall proceed to select a list of jurors from the several counties in the collection district of the collector neglecting or refusing to furnish a list as aforesaid.

2. Of the lists made up as aforesaid, the clerk and marshal shall cause the names to be written, each one, on a separate paper or ballot, and shall roll up or fold the ballots, so as to resemble each other as much as possible, and so that the names written therein shall not be visible on the outside; and they shall place the ballots in a box to be kept by the clerk for that purpose. This box shall be securely locked and sealed, and only opened at the time and for the purpose of drawing jurors. The list of jurors and the box as thus made up shall be the list and box out of which jurors shall be drawn for the year ensuing.

3. When jurors are to be drawn, the clerk and marshal shall attend at the clerk's office or some other public place appointed for the purpose by a judge of the court. The ballots in the jury-box shall be shaken and mixed together, and the clerk or the marshal, in the presence of a judge of the court, unless necessarily absent, without seeing the names written thereon, shall openly draw therefrom the number of jurors required. If a person so drawn is exempt by law, or is unable by reason of sickness or absence from home to attend as a juror, his name shall be returned into the box and another drawn in his stead.

4. A jury-list shall be made up in the manner herein

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indicated, during the months of April and May, annually; provided, that the jury-list for the present year shall be made up as soon as practicable after the passage of this order.

5. Grand jurors shall be drawn and summoned in the same manner as jurors for trials; and when drawn at the same time as jurors for trials, the persons whose names are first drawn, to the number required, shall be returned as grand jurors, and those afterwards drawn shall be jurors for trials.

6. Grand and petit jurors to serve at any stated term of the court, whether at Charleston or at Columbia, shall be drawn, and summons therefor issued, at least fifteen days before the commencement thereof.

7. No more than thirty-one persons to serve as petit jurors, or nineteen to serve as grand jurors, shall be drawn and summoned to attend, at one and the same time, any court, unless the court shall otherwise order.

8. When by reason of challenge or otherwise, a sufficient number of jurors duly drawn and summoned can not be obtained for the trial of any cause, civil or criminal, the court shall forthwith cause jurors to be returned from the bystanders to complete the panel. The jurors so returned from the bystanders shall be returned by the marshal or his deputies, and shall be such as are qualified and liable to be drawn as jurors according to the provisions of law.

9. No person shall be liable to be drawn and serve as a juror oftener than once in two years; but he shall not be so exempt unless he attends and serves as a juror in pursuance of the draft.

10. The jurors in attendance at any term of the court shall be empanelled in the same manner as provided by the laws of the state of South Carolina.

11. The rules heretofore passed relative to designating, drawing, and empanelling jurors, are hereby rescinded.

Statement of the Case.

STATE BANK OF SOUTH CAROLINA.

HUGH v. McRAE, ET AL.

June Term, 1869.

The fact that a corporation is insolvent, will not authorize it to apply to a court of equity for a receiver to wind up its affairs ; and *semble* that this would also be the case with a private person.

A receiver will be appointed in a proper case at the instance of a creditor, but not at that of the insolvent debtor.

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The defendants, procured judgments in the state courts against the State Bank of South Carolina, and were proceeding to enforce them by execution and levy—whereupon the State Bank filed its bill in this court, stating that it was insolvent ; that the defendants were about to procure an inequitable preference over its other creditors ; by means of the executions which they were enforcing ; praying for an injunction to prohibit them from so doing ; and asking that Messrs. Seabring and Lee be appointed receivers to call in the debts and assets of the bank, and to pay out from time to time, under the decree of this court, the moneys collected, according to the respective claims of all the creditors.

The defendants in their answers demurred to the bill for want of equity, and plead to the jurisdiction, besides answering further.

W. G. Dessassure, for complainant.

Brewster, Spratt, Burk, and J. Phillips, for defendants.

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CHASE, Ch. J.—This is substantially a similar case to that of the Southwestern Railroad Bank v. Edwin Parsons, *et al.*, decided at the opening of this court, the only distinction being that, in the present case, the bank confesses insolvency, and in the other case there was no such confession. The court is not aware of any case which will warrant its assuming the administration of the estate of a debtor simply upon the ground of insolvency.

If such a case could be found the court will be called upon to administer every estate where the debtor found himself unable to administer it himself conveniently. A creditor in a proper case might come into a court of equity for the appointment of a receiver, but a debtor could not; this, therefore, is not such a case as calls for the interposition of the court, and the prayer of the bill can not be granted. It must be dismissed.

On motion of Mr. Spratt, the following order was entered:

On hearing the bill and answers in this case, and the argument of counsel, it is ordered that the bill be dismissed.

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DISTRICT OF SOUTH CAROLINA.

THE GARY v. THE SHERMAN.

June Term, 1869.

The Sherman was lying helpless in a dangerous locality, with her engine broken and useless, and in answer to her signals of distress, the Gary came to her relief, and contracted with her captain to tow her into Norfolk for fifteen thousand dollars. On their way thither it was determined between them to go to Charleston instead, and while going there, a false alarm was given that they were in shoal water. At this point of time, the hawser connecting the vessels parted, and there was some reason to believe the Sherman cut it, and the wind being favorable, the Sherman pursued her way by using her sails.

There was sufficient evidence of a fraudulent purpose on the part of the Sherman to avoid the towage, to justify the Gary in not pursuing her and renewing her offers of assistance. Another steamer towed the Sherman into port. *Held*,—the Gary is not entitled to recover the contract price, but she is entitled to salvage, although the second vessel be also entitled to it; and the second vessel is entitled to it.

Porter & Conner, for defendants.

The claim for compensation must rest upon salvage service rendered, or upon the contract made.

As to salvage service:

A salvage compensation can be awarded only to persons by whose agency the vessel was saved. Unless the property be saved in fact by those who claim as salvors, salvage will not be allowed (*Steamboat Liathus*, 1 *Newberry*, 428; *The Pandora*, *Id.* 442).

The indispensable ingredient of a salvage service is

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that of having contributed immediately to the preservation or rescue of the property in peril at sea (The Schooner Wartz, Betts J., *Olcott's R.* 469).

The foundation of the claim for salvage is the rescue of the property from peril, and the placing it in safety—and unless the salvor does place the property in safety, he is not entitled to salvage compensation.

“It is an undisputed principle upon which a claim for salvage at all times rests, that unless the property be in part saved by those who claim the compensation, it can not be allowed, be their intentions however benevolent, and their conduct however heroic” (Clarke v. Brig Dodge Healy, 4 *Wash.* 65c-7). “The property must be effectually saved. It must be brought into some port of safety; and it must be then in a state capable of being restored to the owner before the service can be deemed complete” (The Eubank, 1 *Sumner*, 416).

If there is, from any cause, an absolute voluntary abandonment of the property on the high seas by the salvors, they are not entitled to salvage (*Id.*).

The right to contribution or compensation as co-salvor or joint salvor, applies only where the efforts of second salvors are in connection with and continuation of the efforts of the first salvors—where it is one and the same enterprise, and not to cases where the first salvors have abandoned their effort, *sine animo reverendi*, and sought their port of destination (The India, 1 *W. Robinson*, 409; Louge Bastian, *S. Robinson*, 322; The Samuel, 4 *Eng. L. & E.* 581; The Eubank, 1 *Sumner*, 417; The Schooner Wartz, *Olcott*, 469).

When first set of salvors voluntarily and entirely abandon their enterprise, and a second salvor comes in and effects the salving, it is an entirely new enterprise. The second salvor is entitled to the entire compensation, and the first salvor has no right to claim compensation for efforts which he abandoned before placing the prop-

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erty in safety (*The India*, 1 *W. Robinson*; *The Eubank*, 1 *Sumner*, 418; *The Wartz*, *Olcott*, 469).

If first salvor is able to save property, there can not be co-salvors, without the assent of the first salvor, and if the second salvor were not on a new undertaking, but is to be regarded as a continuance of the original enterprise, then the Gary must be regarded on the principle of admiralty law as the meritorious salvor of whatever is preserved, and is entitled to the possession of it, and the possession of the Maryland, the second salvor, was tortious, notwithstanding that the Gray had abandoned the Sherman, and was in port at Wilmington when the Maryland met the Sherman on the high seas (see *Brig Gilpin*, *Olcott*, 86, and cases cited; *The Blenden Hall*, 1 *Dodson*, 414).

That if abandonment was from a mistake of judgment, it relieves the party from moral blame, but not from legal consequences of his acts.

As to the contract, the contract was for towage to a port of safety. The port of safety was of the essence of the contract.

To entitle libellant to the benefit of contract, he must prove performance. "In general, if the agreement be that one party shall do an act, and for the doing thereof the other shall pay a sum of money, the doing of the act is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money until the thing be performed" (*Chitty, Pleadings*, 1, 322; *The Hector*, 3 *Hay*. 94).

Admiralty guards the rights and enforces the duties arising or to be performed on the sea.

It has been called the humane providence that watches over those who go down to the sea in ships and do their business on the great deep.

The case is stated so fully in the opinion of the court that no addition can be made to it.

Opinion by CHASE, Ch. J.

CHASE, Ch. J.—It is not likely that I shall arrive at any other conclusion in this case than that to which the evidence has already brought me. It is a case of salvage. The libellant makes no claim on the ground of contract. Admiralty guards the rights and enforces the duties arising or to be performed on the sea. It has been called the humane providence that watches over those who go down to the sea in ships and do their business on the great waters. Its rules of proceeding are not those of the common law. They are not technical. They aim at substantial justice, according to the principles of equity, applicable in each case.

What is the substantial justice in this case?

The steamship Sherman on her voyage southward was disabled by the breaking of her shaft near Cape Lookout, and was lying in-shore in a position where a change of weather might drive her aground, and cause a total loss. Her engine was useless. She had sails, but the evidence shows that the ship could not be navigated safely without the aid of steam. Where she was, her sails seem to have been of no use to her.

In this condition of distress, she made the ordinary signals for assistance from other vessels which might be in the vicinity.

Hearing the signals the Gary came to her relief, and negotiations took place which show the estimate put by the respective parties on the assistance needed and its value. It was agreed between them that the Gary would tow the Sherman into Norfolk, for fifteen thousand dollars. Under the circumstances of this case, the contract can not be the measure of damages, but it is proper to take it into consideration as showing the views of the parties at the time. The fact that the contract was made can not deprive the Gary, as salvor, of her right of compensation, if, though not performing the contract, she rendered salvage service, and did not forfeit her claim to compensation by her subsequent conduct.

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Under the contract of towage, the vessels proceeded some time in the direction of Norfolk, when an unfavorable change of weather took place. The captain of the Gary, satisfied that it would take a great deal of time to get into Norfolk, proposed to change the port of destination, and go to Charleston. The proposition was assented to by the captain of the Sherman, and the courses of the steamers changed accordingly.

They proceeded safely and easily in the new direction until they reached Frying Pan Shoals, where the difficulties which give rise to this action occurred.

I can not resist the impression made by the testimony for the libellants, that both vessels were quite safe at that moment. Undoubtedly there was an alarm on board of the steamer, and there was no reason for it, for the leadsman reported four and a-half fathoms water and shoaling. The evidence satisfies me that this report was an error. The captain of the Sherman, however, necessarily became anxious about the situation of his ship, and changed her course notwithstanding the captain of the Gary, to whom he called, assured him that there was no danger. From this unnecessary change of course all the subsequent mischief arose. The Gary endeavored to accommodate herself to the movements of the Sherman, and in consequence of the manœuvres of the two vessels, the hawser by which the Sherman was towed parted, and the two vessels separated. In this state of things it was the duty of the Sherman to lay to and wait assistance from the Gary, which was obliged to take in the hawser before the vessel could be safely navigated. Instead of doing this, the Sherman proceeded under sail, the wind being favorable, towards Charleston. On the other side, it was the duty of the Gary, as soon as possible, to render the stipulated assistance.

There is much conflict in the testimony upon the point whether the Sherman made any signals after the

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vessels separated. The weight of the evidence is that she did not. On the other hand, the evidence shows that when the hawser was brought on board the Gary, there was evidence that it had been cut on the Sherman. The captain of the Gary concluded naturally enough, that the separation of the vessels was designed. The Sherman had gone off, as he thought, with the intent to get rid of the towage. Under these circumstances he thought it useless to go in pursuit.

I do not think that the evidence that the hawser was cut is conclusive, though it is certainly strong. I think that the appearances, regarded by witnesses as evidence that it was cut, may be well enough accounted for by the peculiar circumstances under which the hawser parted. The captain of the Gary, however, certainly had reason for the conclusion he came to. He knew the vessels were safe at the time the disturbance arose upon the Sherman. The steamer had gone off without apparent reason; there was what seemed to him strong evidence of a fraudulent intent to evade the contract on her part.

Although this conclusion does not seem warranted by the evidence before me, there was in the circumstances of the case, in my opinion, a sufficient excuse to the captain of the Gary for not proceeding in search of the Sherman. He is not entitled to payment under the contract, as he would have been if he had followed the Sherman and offered to continue in the performance of it, and that offer had been refused; but I think he was entitled to salvage. Through the aid of the Gary, the Sherman had been rescued from danger, and brought safely a great part of the way to Charleston. Favorable winds enabled her to proceed still further without that aid, and then she found another vessel which towed her into port. Under these circumstances, I am inclined to regard this as a case of salvage, in which two vessels performed successfully the salvage services.

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None of the cases which have been cited in argument are exactly similar, but the principles upon which some of them were decided sustain, as I think, this view.

This leaves only the question of compensation to be determined. Undoubtedly, if the Gary had pursued the Sherman and offered continued assistance, her case would have been better; perhaps, had she done so, and her further assistance had been declined, she might have been entitled to the full amount stipulated in the contract. As it was, I think she was entitled to such an amount as would be a fair compensation for the services actually rendered by her. She rescued the Sherman from a certain degree of peril; by deviating from her course to render that assistance, she forfeited her insurance; a considerable time was devoted to the service, and a certain amount of expenditure was incurred. It is difficult to say what is a fair reward for the services thus rendered.

Under the circumstances, it seems proper to refer to the testimony concerning the attempt to compromise the difference between the owners of the two vessels. It appears that the owners of the Gary were willing to take four thousand dollars, and that the Sherman offered three thousand dollars. This evidence, to be sure, is by no means conclusive as to the actual value of the services, but before I heard it I inclined to the opinion that three thousand five hundred dollars might be fairly decreed, and this evidence confirmed that opinion. Upon the whole, therefore, I will pronounce for the libellant, and decree three thousand five hundred dollars as salvage.

Statement of the Case.

DISTRICT OF SOUTH CAROLINA.

CARSON v. ROBERTSON ET AL.

The objection of the want of parties may be taken at any time in the progress of a cause, even in the appellate court.

It will be disregarded whenever taken, if it appears that the parties are not necessary, or if although convenient and under some circumstances necessary, they can not be made without depriving the court of jurisdiction.

On the other hand if it appears that no final decree can be made without material prejudice to the interests of parties not before the court, the court will not proceed without them, even though such parties are beyond the reach of its process, or can not be made without ousting the jurisdiction.

In applying these rules, however, the courts of the United States are always careful to see, that no citizen of a state, other than that in which the defendants reside, shall invoke their jurisdiction in vain, unless it is obviously impossible to protect the interests of the absent parties in their decrees.

They will strain a point in favor of the constitutional right of citizens of the United States to sue the citizens of the other states in the courts of the United States. It is a right too clear and too important to be lightly disregarded.

One of a firm of several partners purchased, with the firm funds, land, substantially for the firm, but the conveyance was taken in his name and that of one of the other members in trust, for whatever use those two, or the survivor of them, might declare, and until then to the use of all the partners.

These two made a mortgage upon the land, to secure a sum of money to a third. In a suit to vacate the whole transaction by the parties who owned the land before its sale,—*Held*, that the partner who had actively managed the affairs, being one of those to whom the conveyance was made, was the only necessary party, the other parties being non-resident.

Statement of the Case.

Statement of the Case.

In August, 1856, W. A. Carson died in South Carolina, leaving a large amount of property, real and personal, in that state. By his will he appointed the defendants, Alexander Robertson and John F. Blacklock, executors thereof, directed them to sell, with small exceptions, all his property as soon as and upon the terms they deemed judicious, to pay his debts out of the proceeds, to divide the balance of the proceeds into three equal parts, and to hold in trust one-third part for his son, William Carson, another third part for his son, James Petigru Carson; and the remaining third part for his widow, the complainant, during her life, and after her death for his two sons.

Both executors qualified; about the beginning of 1857 had sold all the property, paid the debts, divided the proceeds into three equal parts, and became the joint holders in trust of one such part for each of the three said legatees. For William Carson they held a bond of E. N. Ball, the defendant, for nine thousand dollars, and one-third of another bond of E. N. Ball for four thousand dollars; for J. P. Carson, a bond of E. N. Ball for nine thousand dollars, and one-third of the said bond of E. N. Ball for four thousand dollars; for the complainant a bond of E. N. Ball for nine thousand dollars, and one-third of the said bond of E. N. Ball for four thousand dollars. The said bonds, executed to the two executors, and amounting in the aggregate to thirty-one thousand dollars, were secured by E. N. Ball's mortgage to the two executors, of Dean Hall Plantation, which was the testator's property, and had been sold to E. N. Ball for fifty thousand dollars. These bonds and the mortgage were given to the executors to secure the unpaid portion of the purchase money of Dean Hall. Both executors joined in the

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conveyance to E. N. Ball. The executors also held for each legatee a joint and several bond of E. N. Ball, and the defendant, W. J. Ball, for eleven thousand dollars, each bond being executed to both executors.

Since the early part of 1861, the complainant has resided in New York, and William Carson in Europe or New York. Mr. Blacklock was in Europe during the whole period of the war. In March, 1863, the defendant, McBurney, entered into a treaty with E. N. Ball for the purchase of Dean Hall for one hundred thousand dollars of Confederate Treasury Notes, and advanced in his own name, or for those he represented, a certain amount of those notes to E. N. Ball, to enable him to get his said bonds and mortgage satisfied by Robertson. Robertson was the only one of the trustees then in the Confederacy. The complainant and William Carson were beyond the limits of the Confederacy, and had no communication with Robertson after the outbreak of the war. William and James P. Carson were both under age. Mr. Blacklock was abroad, and could not be consulted. Mr. Robertson acceded to the proposition of E. N. Ball, and for an amount of the Confederate notes of the nominal value of the bonds and mortgage, surrendered them, and entered satisfaction on the mortgage. The market value of the mortgage bonds was much greater than their nominal value in Confederate notes. These notes could not have been used at the time by either the complainant or William Carson. E. N. Ball, in pursuance of his treaty, subsequently, viz., in April, 1863, conveyed Dean Hall to McBurney and his nominees. McBurney had notice that the bonds and the mortgage of Dean Hall were in the name of both Robertson and Blacklock, and that they held them in a fiduciary character.

The complainant always repudiated the transaction. When the sons came of age, they did so. Mr. Blacklock also repudiated it.

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The bill alleged the insolvency of Robertson and Blacklock, and the fact was not specially denied in their answers :

The defendant McBurney set up by way of defense the following state of facts :

In March, 1863, after some negotiations looking to that result, E. N. Ball sold said tract and conveyed it to McBurney and A. L. Gillespie. The land was paid for out of the partnership funds, the firm being composed of McBurney, Gillespie, Hyatt, Hazeltine, and McGhan. The land was conveyed to the first two, and to the survivor, and to the heirs and assigns of such survivor forever, but to and for such uses as those two or the survivor of them should appoint by deed, and until such appointment, to the use of the different members of the firm, naming them.

On May 31, Hyatt sold his interest in the firm to the other partners, and took their bond for forty thousand dollars for it, and McBurney and Gillespie executed a deed in the nature of a mortgage upon said tract, to secure it, but before this mortgage was executed Hyatt released all his interest in the land to the other partners.

At the time this suit was instituted, Hyatt was a citizen of New York ; Hazeltine was resident in England ; Gillespie, after the filing of the bill, removed to New York to live, and Ball, before filing the bill, was a non-resident, and had become bankrupt.

Magrath & Lowndes, for complainant.--The complainant relied on the following principles: I. The court of the United States are exceptionally liberal in dealing with the question of parties (*Hallet v. Hallet*, 2 *Paige*, 17 ; *Mallow v. Hinde*, 12 *Wheaton*, 198 ; *Eberly v. Moore*, 24 *Howe*, 158).

II. In pursuance of this policy the courts of the United States hold that where a party not before the court is not an inhabitant of or found within the district where

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the suit is brought, the court will proceed without such party, unless he is an indispensable party, or one whose rights are necessarily affected by the decree.

The sources of this rule are: 1. The act of 1839 (1 *Brightly*, 15). 2. The 22d and 42d Rules in Equity (see *Shields v. Barrow*, 17 *How.* 149, and cases there collected; *Payne v. Hook*, 7 *Wall.* 431).

I. Robertson & Blacklock, being co-trustees, the act of Robertson, who alone satisfied the mortgages, and whose act in so doing has been repudiated by Blacklock, did not discharge the mortgages in equity, even if it did at law, and the *cestui que trust* is in the same position as if no act affecting the mortgage had been done. It is assumed here (what will be shown later in this argument) that when Robertson entered satisfaction upon Ball's mortgage, Robertson & Blacklock held the mortgage as trustees. The language of the will of W. A. Carson plainly made them joint-trustees. Whether, at law, the act of Robertson discharged the mortgage, is very doubtful. There is no case in South Carolina sustaining such a discharge. In England the legal title would clearly not have passed. Even since the act of 1791 (5 *Stat.* 169), there has been so far a legal estate in the mortgagee, that he can recover the land after condition broken against any one but the mortgagor in possession (*Mitchell v. Bagan*, xi. *Rich. Eq.* 688), and that a release to him of the Equity of Redemption vests in him the legal title (5 *Stat.* 311). The Act of 1791 is to be construed strictly, and not as destroying any of the incidents of the mortgagee's estate, save those in conflict with the purpose of the act. Such is the spirit of the statute just cited. There is no ground for saying that the method of satisfying mortgages is affected by the act of 1791. The interest of the mortgagee is at least of as high a character as the interest of the holders of a

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chattel real, in which there is an estate, and of which the title can not pass by the act of one of two or more holders (2 *Kent*, 211, note, ed. 1851). But whether or not there was a discharge of Ball's mortgage at law, it was not discharged in equity. Both of the joint-trustees must have concurred in the satisfaction entered. "Where the administration of the trust is vested in co-trustees, they all form, as it were, one collective trustee, and, therefore, must execute the duties of the office in their joint capacity" (*Lewin on Trusts*, 297). "Where stock is standing in the name of the several co-trustees, any one may receive the dividends, though all must join in the sale of the coupons; and where they are co-trustees of lands, any one of them may receive the rents, though all must concur in conveyance" (*Ib.*, 299). "As a general rule, trustees must all join in any sale, lease, or other disposition of the trust property, and also in receipt for money payable to them in respect of their office" (*Hill on Trustees*, 307). "If a trustee refuses to join, it is not competent for the others to proceed without him, but the administration of the trust devolves upon the court" (*Lewin*, 298). "Where an account is opened at a banker's, in the name of two or more trustees, it is in their power to require that the checks should be signed by all or any one or more of their number. In strictness it is the duty of trustees to require that the check should bear the joint signature of all the trustees" (*Hill*, 308). "Where there is a trust for sale, the receipt must be signed by all the trustees who have undertaken to act. And where a power is given to trustees to discharge the purchaser from seeing to the application of the purchase money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustee, for a transfer of the estate at law carries not along with it the confidence in equity" (*Lewin*, 448). "A trustee who has once acted in or accepted a trust, and has not

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been properly discharged from it, must join with the other trustees in the receipts to purchasers or other persons requiring a discharge for the payment of trust money. And it is immaterial that he has parted with the possession of the legal estate" (*Hill*, 307; *Sugden*, V. & P. 50). "If the court is of the opinion that the trust was joint, then the execution is imperfect, and the court will refuse to enforce it" (*Mayrant v. Guignard*, 3 *Strob. Eq.* 128). Such being the law, what is the state of facts to which it is to be applied? Robertson and Blacklock were named co-executors and co-trustees by Mr. Carson's will. They joined in the conveyance to Ball. Ball's bond and mortgage were to them jointly. In the absence of Mr. Blacklock in Europe, and in a time of war, when intercourse with Europe was precarious, McBurney and E. M. Ball, ignoring Mr. Blacklock entirely, negotiate with Robertson alone, deliver the consideration of the discharge to him alone, and get only his satisfaction on the mortgage. The right which the *cestui que trust* has to the benefit of the concurrence of two trustees in any act of such importance to her is ignored. Mr. Blacklock does nothing which amounts to acquiescence in the conduct of his co-trustee, and now, before the court, repudiates the transaction. Under these circumstances, the discharge of the mortgages and bonds is not such as equity will respect. The purchaser took with full notice of the trust and the breach of it, and against him equity will enforce the mortgage, either at the suit of the other trustee (*Lewin*, 317) or of the *cestui que trust*. It is no answer to say that the bonds were paid, and the security is, therefore, discharged as a legal consequence of payment. There is no payment set up, but simply an exchange for Confederate treasury notes. The power given by Mr. Carson's will to one executor was given in the event that only one qualified. Both

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Robertson and Blacklock having qualified, no question arises under that clause of the will.

II. The act of Robertson was in other respects in breach of his trust, and the purchaser, who not only had full notice of the trust, but assisted in the breach of it, can not hold the estate against the *cestui que trust*. It is necessary to determine the relation in which Robertson, or Robertson and Blacklock, stood to the estate, and to apply the rules by which equity measures their conduct in that relation. 1. It is submitted that they were trustees; that as such trustees they possessed no special powers, but only the general powers attaching to trustees; that as such trustees it was a breach of trust in them, or either of them, to release the mortgages of Ball without payment of the bonds they secured. Robertson and Blacklock were named in the will of W. A. Carson both executors and trustees. What is the rule to determine the capacity in which they were acting at the time in question? "Where the right of receiving a fund as guardian, and the duty of paying it as trustee unite in the same person, the law presumes a performance of the duty, and without further proof a surety of the person as guardian is liable" (Gray v. Brown, 1 *Rich. L.* 351). "When the right to receive and the duty to pay absolutely concur, there can be no election" (*Id.* 363). "Where an administrator has in his hands the balance of an estate, and is afterwards appointed the guardian of infants entitled to the estate, he will be chargeable as guardian" (O'Neill v. Herbert, *McMul. Eq.* 495). "A debt due by an administrator to his intestate's estate is assets in his hands; and if the administrator of an estate becomes also the administrator of one of the distributees, his liability for the distributive share of the latter in the estate of the former attaches upon his second administration" (Schnell v. Schroder, *Bailey's Eq.* 328; see also Taylor v. Deblais, 4 *Mason*, 131). When a fund is given to a

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person upon certain trusts and he is appointed executor, as soon as he has severed the legacy from the general assets and appropriated it to the specific purpose, he dismisses the character of executor and assumes that of trustee (*Phillips v. Munnings*, 2 *M. & C.*, 309; *Byrchal v. Bradford*, 6 *Mad.* 13, 235; *Ex parte Dover*, 5 *Sim.* 500; *Hill on Trustees*, 237, 364; *Lewin on Trustees*, 246). Robertson and Blacklock had, at the time of the sale to McBurney, and long before, performed all their duties as executors of Mr. Carson's will, and the legal presumption that they had transferred the assets to themselves, as trustees, attached. Mr. Robertson says, in his answer, that towards the close of the year 1856 and the beginning of 1857, the executors sold out the entire estate of W. A. Carson, and paid the debts due by him, and held the balance in trust for the purposes of the will. Again, he states in his answer that they held distinct portions of the balance for the several legatees. Mr. Blacklock confirms this statement. In the ordinary's account, filed with the bill, they name themselves trustees. Those accounts show that the estate had been completely settled. It will be difficult for the defendants to show any purpose for which the estate of the executors should be held to have existed in 1863. The onus of rebutting the presumption of law as to the extinguishment of that estate lies upon the defendant. In all the cases cited, the presumption was upheld against third parties. But it is not necessary to resort in this case to the presumption of law; the testator indicates the event that is to mark the termination of the office of executor; he directs the residue of the purchase money to be divided into three parts and held in trust. Robertson says the division into three parts had taken place about the beginning of 1857. As such trustees, no special powers were given to them by the will of Mr. Carson, the language of which is, "I order and direct my executors

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to sell," &c. "I authorize and empower my executors or qualified executor to invest and re-invest," &c. The power of sale was exhausted on the sale to Ball, through which the defendants make their title. Why is the expression "qualified" used in giving the power to the executor, if he was meant to use it in his character of trustee? Robertson and Blacklock being then trustees without special powers, what was their authority? The bond of Ball was a contract to pay money, either as interest or principal, and the trustees had no other power in respect to it but to receive money by way of interest and principal whenever either was due. They could exercise no proprietary power over the bond (*Lewin*, 512), *e. g.*, they could not accept something else than money in accord and satisfaction of it. A court might have given them such authority, but Mr. Robertson did not seek its aid. In the case of trustees for sale, there can be no conveyance without the payment of the money (*Id.* 431). "A trustee will not be allowed to exercise his legal powers to the prejudice of his *cestui que trust*, and a release by the trustee without any consideration would, unquestionably, be set aside in equity, although the party released had no notice of the trust. And the case for relief would, of course, be still stronger, if the party released had actual notice of the trust" (*Hill*, 503). The Confederate treasury notes delivered to Robertson by Ball were not money, and Ball's act was not payment of the bond. It is not necessary to trouble the court with many authorities on that point. The securities which are the subject of this suit are dated January 8, 1857, and March 2, 1857, and are for the payment of dollars. "It is quite clear that a contract to pay dollars, made between citizens of any state of the Union which maintains its constitutional relations with the National Government, is a contract to pay lawful money of the United States, and can not be modified or explained by

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parol evidence" (Thorington v. Smith, 8 *Wallace*, 13). "Prior to February 25, 1862, all contracts for the payment of money, not expressly stipulating otherwise, were, in legal effect and universal understanding, contracts for the payment of coin; and, under the constitution, the parties to such contract are respectively entitled to demand and bound to pay the sum due, according to their terms in coin" (Hepburn v. Griswold, 8 *Wallace*, 604). See also the decisions of the courts of South Carolina since the war that Confederate treasury notes are not money (Austin v. Kinsman, *Rich. Eq.* 13, 259; Mayer v. Mordecai, *November Term*, 1869, *MSS.*).

2. But assuming that the powers in respect to investment, given by the will of Mr. Carson, belonged to Robertson and Blacklock in their character of trustees, they exercised those powers in breach of their trust—first, in calling in Ball's mortgage; second, in exchanging it for Confederate treasury notes. The acceptance of these notes by Robertson, in lieu of money, was, as we have shown, a purely voluntary act, and was, therefore, equivalent to a calling in of the mortgage. Money outstanding upon good mortgage security, an executor is not called upon to realize until it be wanted in the course of administration (Orr v. Newton, 2 *Cox*, 574; Howe v. Earl of Dartmouth, 7 *Ves.* 170; 3 *Leading Cases in Eq. note p.* 444). It is not the duty of trustees to call in money invested on good real security where no risk is apparent (*Hill*, 381; Saddler v. Turner, 8 *Ves.* 621). It has been decided that even an express power to vary the securities does not authorize changes made without any apparent object or any prospect of benefiting the trust estate (Brice v. Stokes, 11 *Ves.* 324). Our case of Mayer v. Mordecai (November Term, 1869), not reported, seems to rule the same principle. In these cases, except the last, it was held a breach of trust to receive payment

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of securities. *A fortiori* an exchange of one security for another would be bad in like circumstances. It is doubtful whether the trustees had any power in equity to exchange one security for another. The language of the will is, "I authorize and empower my executors, or qualified executor, to vest and re-invest the purchase money of my estate, so as aforesaid to be held in trust by them, in such public or private securities or stocks as they may deem best." The words "vest" and "re-invest," have reference only to money, and the testator here uses them in connection with the word money. He means to authorize his trustees to change money, coming into their hands from time to time during the continuance of their trust, into other kinds of property. But such was not Robertson's act; he did not get the money due upon his security and invest it; if he had, the purchasers of the trust property would not have been made parties to this suit, but in excess of his authority he made an exchange of his security for another. But if the act of Robertson was a breach of trust because premature, and because in excess of his authority, it was likewise such because of the character of the security, viz., Confederate treasury notes, he received in satisfaction of Ball's mortgage. It is proposed to show: *a.* That discretionary powers of investment by trustees are subject in equity to certain restrictions. *b.* That on general principles they do not extend to investments in such securities as Confederate treasury notes. *c.* That the precise point is "*res judicata.*" (*a.*) "If there be a trust to invest at discretion on 'some good or sufficient' security, or 'at discretion,' the court will not allow the trustees to exercise any discretion as to the nature of the security, but will decide upon the goodness or sufficiency of the security by its own rules" (*Hill*, 495). "A power of sale, or of varying trust securities, though to a certain extent discretionary,

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must not be exercised in an arbitrary or mischievous manner" (*Id.*). A trust to invest, at the trustee's discretion, will not authorize a loan of trust money on personal security (*Pocock v. Reddington*, 5 *Ves.* 794). Where trustees are empowered to lend "on such securities as they should approve," they are bound to make inquiries, and exercise a sound discretion whether the securities are of sufficient value (*Stratton v. Ashmall*, 3 *Drew*, 10). Where money is to be converted "into government funds or other good securities," neither South Sea stock nor bank stock will be good investment (*Trafford v. Boehm*, 3 *Atkyns*, p. 444). In *Spear v. Spear* (9 *Rich. Eq.* 184), it is said that a more strict rule is applied to trustees by appointment than such as give bond. And in this case, the great rule laid down is to place the property in a state of security. In it the court also intimates what are proper securities. 1. Public; 2. Bonds, secured by liens on real estate; 3. Bonds of third persons, with proper sureties. (b.) Confederate treasury notes are clearly not within the principle of these cases. By the very terms of the contract of which they are the evidence, their payment depends upon a contingency. The doubtful character of the contracts of an unrecognized government, had been the subject of frequent comment in the courts of England and of this country (*Thomson v. Powles*, 2 *Sim.* 194; *Taylor v. Barclay*, 2 *Id.* 214; *Bire v. Thompson*, 2 *Id.* 214; *Jones v. Garcia*, 1 *Tur. & Rus.* 297; *Gelster v. Hoyt*, 3 *Wheat. Rep.* 303; *Rose v. Hincley*, 4 *Cranch*, 241). The Supreme Court of the United States, through Chief Justice CHASE, described their character accurately in *Thorington v. Smith* (8 *Wall.* p. 11). "As contracts in themselves, except in the contingency of successful revolution, these notes were nullities: for except in that event there could be no payer. They bore this character upon their face, for they were made payable only

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'after the ratification of a treaty of peace between the Confederate States and the United States of America.' '' In the last case on this subject, the Supreme Court of this state says: "The bond was secured by a mortgage of real estate, according to the testimony, in May, 1862. When the first payment in Confederate money was accepted, such property was worth, in that currency, about fifty per cent. more than it would have brought in gold before the war, and in May, 1863, it was worth three times as much" (Mayer v. Mordecai, *MSS. S. C. Rep.*). The sale of Dean Hall, to the defendant McBurney, for one hundred thousand dollars in Confederate treasury notes, is itself sufficient proof of the appreciation in the value of the mortgage. (c.) It has been expressly held that the receipt of Confederate treasury notes, by a trustee, is a breach of trust (see Mayer v. Mordecai, *Sup. Ct.; S. C. Nov. Term, 1869, MSS.*; Fitzsimmons v. Fitzsimmons, *Ibid*; Sanders v. Rogers, *Ibid.*; Dunn v. Dunn, *Ibid.* (3.) It remains to consider the liability of the purchasers in this case from the trustees. We have shown that the trustees committed a breach of trust in parting with the mortgage. It is admitted by the answers that the purchasers had full notice of the trust, and that the defendant McBurney advanced to Elias N. Ball the Confederate treasury notes to enable him, in breach of his trust, to satisfy the mortgage held by the trustees and to convey Dean Hall. "Where a party purchases trust property, knowing it to be such, from the trustee, in violation of the objects of the trust, courts of equity force the trust upon the conscience of the guilty party and compel him to perform it." "An abuse of trust can confer no rights on the party abusing it, or on those who claim in privity with him" (*Story, Eq. Jur. II.* 487, 489, ed. 1861). "The doctrine . . . is strictly applicable to every purchaser whose title comes into his hands affected with such notice" (*Ibid.* 390).

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“If a purchaser have notice of any claim or incumbrance, his conscience is affected, and a court will then not only refuse to interfere in his favor, but will assist the claimant or incumbrancer in establishing his claims against him: his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily and of his own free will. And it may be laid down as a general rule that a purchaser with notice is bound in equity to the same extent, and in the same manner as the person was of whom he purchased. . . . If he buy with notice of the trust, although for a valuable consideration, he must convey the estate to the uses of the settlement” (*Sugden, Vendor and Purchaser*, Vol. III. ch. 22, § II.). “If the alienee be a purchaser of the estate (*i. e.* of an estate subject to a trust) at its full value, then if he take, with notice of the trust, he is (subject to the protection afforded by the Statute of Limitations) bound to the same extent, and in the same manner as the person of whom he purchased; . . . and the rule applies not only to the case of a trust properly so called, but to purchasers with notice of any equitable incumbrance as of a covenant or agreement affecting the estate or a lien for purchase money. . . . A purchaser without notice, from a purchaser with, is not liable for his own bona fides is a good defense in itself, and the *mala fides* of the vendor ought not to invalidate it” (*Lewin on Trusts*, 725). “A purchaser from a trustee, though for a valuable consideration, will be bound by the trust in the same manner, and to the same extent, as the trustee, if the purchase be made with notice of the trust” (*Hill on Trustees*, 509). “Where a purchaser with notice from a trustee conveys, for valuable consideration, to another person who has no notice of the trust, the estate will not be affected with notice in the hands of the second purchaser” (*Ibid.* 516). “A purchase for valuable consideration without notice will

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not be a complete defense in a court of equity, unless the purchaser has clothed himself with the legal estate" (*Ibid.* 517. See, also, *Spence, Eq. Jur. II.* 192). The principles cited from the text-books, are sustained by a mass of authority both in England and in this country (*Wigg v. Wigg*, 1 *Atkyn*, 382; *Mead v. Lord Orrery*, 3 *Atkyn*, 238; *Mackreth v. Symons*, 15 *Vesey*, 350; *Willoughby v. Willoughby*, 1 *Term Rep.* 771; *Boney v. Smith*, 1 *Vernon*, 149; *Daniels v. Daniels*, 16 *Vesey*, 249). "It is a clearly established principle in equity jurisprudence that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has the full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser for a valuable consideration without notice. . . . The right or option of the *cestui que trust* is one which positively and exclusively belongs to him" (*Oliver v. Pratt*, 3 *How.* 333). "Wherever the purchaser is affected with notice of the facts which in law constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud will not avail him if the transaction is such as a court of equity will not sanction" (*Wormley v. Wormley*, 8 *Wheaton*, 421). In this case, the equity was enforced against the purchaser from the trustee's vendee; and relief was sought and granted both against the trustee and the purchaser. In the case of *Caldwell v. Carrington* (9 *Pet.* 86), the same equity was enforced against purchasers for valuable consideration. In that case, the person from whom the purchase was made, and who committed the breach of trust, was not a party to the suit, "because not an inhabitant of the state" (*i. e.* where the suit was brought). In *Boone v. Ohiles* (10 *Pet.* 212), the doctrine is explicitly stated. The rule has been recognized, and constantly enforced by the

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courts of South Carolina. "One purchasing land, to which another has an equitable title, with notice of the equity, takes subject to the equity, and is bound to convey in like manner as the person from whom he purchased" (Massey v. McIlvain, 2 *Hill Chan.* 421; James v. Bremar, 2 *DeS.* 560; Marogne v. Carrol, 4 *DeS.* 256; Williams v. Hollingsworth, 1 *Strob. E.* 103; Bush v. Bush, 3 *Strob. E.* 131). A purchaser, for valuable consideration, with notice, will not be protected (O'Neill v. Cothran, 4 *DeS.* 553; Blake v. Jones, *Bailey*, 141). The doctrine is recognized in Cummings v. Coleman (7 *Rich.* 509), in Ellis v. Woods (9 *Rich. Eq.* 19), in Frelwell v. Neal (11 *Rich. Eq.* 559, 1859). These cases show that the principle has always been enforced by the courts of South Carolina without question. Where the application of the rule was resisted, it was because of the facts of the particular case. As to the wisdom of this acknowledged principle of equity jurisdiction, there can be but one opinion. It is beyond question the most important rule which equity enforces for the protection of *cestuis que trustent*. Indeed, it may be said that equity could not adequately protect them in the absence of the doctrine. If the trustee's sense of duty, and his personal responsibility, were the sole guarantees which *cestuis que trustent* possessed for the proper preservation of their property, an equitable estate would be a precarious species of property. It is to protect them at once against the trustee's misconduct, and his inability to make indemnity, that equity has given them a two-fold remedy, viz., against the trustee and against his vendee. Nor is it hard upon the latter that, with full notice of the fact that he is dealing with a trustee, he should be held to take nothing by any act of the latter which is a breach of his duty. Without the rule, to deal with an unworthy trustee would become profitable. This case is a fair illustration of the wisdom of the rule,

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for, in view of the insolvency of the trustees, the complainant will be deprived of her property, and will be practically without remedy, unless she has it against the purchaser. The principle that a purchaser for value of a non-negotiable chose in action, is affected with equities of which he has no notice, and of which by no amount of care, he could obtain knowledge, is harsh in comparison with that now contended for; yet it is enforced without question. The defendants, McBurney, E. N. Ball and W. J. Ball, claim, through the will of W. A. Carson, and have, therefore, in law, notice of that will and its contents. "The purchaser is supposed to have knowledge of the instrument under which the party with whom he contracts as executor, trustee, or appointee, derives his powers" (*Story, Eq. Jur.* § 400). "If a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate which these tenants have, and therefore he is affected with notice of all the facts as to their estates" (*Taylor v. Stebbert*, 2 *Ves. Jr.* 440; *Daniels v. Davison*, 16 *Ves.* 249; *Smith v. Law*, 1 *Atk.* 489). Registration of a conveyance, required by law to be registered, is notice to all the world (*Story, Eq. Juris.* § 403). Wills and executors' accounts are, by law, required to be registered in South Carolina (11 *Stat.* 48). The defendants, McBurney and W. J. Ball, admit by their answers, actual notice of the fact that Robertson and Blacklock were dealing in the character of executors. In respect to W. J. Ball, it is to be observed that he is not in the position of a purchaser for value at all, no consideration having moved from him for the discharge of his bond. He is discharged only if the act of E. N. Ball discharges him, and he can be in no better position than E. N. Ball. It is difficult to suggest any argument against the liability of the latter. The peculiar circumstances of this case strengthens the equity against

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the purchaser. A state of war existed. The only adult *cestui que trust* and one of the infant *cestuis que trustent* were in that part of the United States loyal to the government. The trustee, the purchaser, and an infant *cestui que trust* were in the Confederacy. One effect of the war was to render intercourse between the trustee and two *cestuis que trustent*, at least extremely difficult and precarious. It moreover made that intercourse criminal (Chancellor KENT, *Griswold v. Waddington*, 1 *Johns*, 483). The Confederate treasury notes were not only useless to the two absent *cestuis que trustent*, but it was unlawful for them to deal with them at all. The state of the country in which the purchaser resided enhanced, as a trust security, the value of the mortgage, which has, at all times been a favorite security of courts of equity. It is submitted that all these facts were equivalent to an actual, positive notice to the purchaser that the absent *cestuis que trustent* disproved of the action of the trustee, and affect his conscience in equity. It is hardly matter of doubt that if the complainant's demand were made against a citizen of a state which did not form part of the late Confederacy, and were made in a court of that state, it would be sustained. A purchaser from a trustee in a state not of the Confederacy, making his purchase with Confederate treasury notes, would scarcely be protected. To hold that on the same facts the complainant can not recover against a citizen of South Carolina, is to establish a strange discrimination in favor of the citizens of states which formed part of the Confederacy. In *White v. State of Texas*, the Supreme Court of the United States held expressly that the laws of the United States were in force throughout the Confederacy during the war. But in *Mayer v. Mordecai*, lately decided by the Supreme Court of South Carolina, a very different rule from that contended for was laid down. "Although the trustee is not discharged from liability to account

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for the three bonds, yet the mortgages as against the original debtors can not be set up as of force. The legal title to the bonds was in them, and with the investment of the proceeds they had no concern. If, according to the ruling in this state, the vendee is not bound to see to the application of the purchase money (*Lining v. Peyton, Des. 2, 375*; *Laurens v. Lucas, Rich. Eq. 6, 262*), or a mortgagee under the order of the court that the money is appropriated to the purpose for which the mortgage was taken (*Spencer v. Bank of the State, Bail. Eq. 468*); much less can a debtor who makes satisfaction to the creditor, in a manner acceptable and agreed by him, in the form of actual payment, be held to such requisition." Mr. Justice ING-LIS, in *Austin v. Kinsman (Rich. Eq. 13, 265)*, says, "a creditor, though entitled to demand payment in lawful money, may waive his right and accept any substitute he pleases, and his voluntary acceptance of such substitute as payment makes it so." "If the satisfaction of the bonds was the result of a fraud between the creditors and the trustee, or produced by an improper combination, to the prejudice of the *cestui que trust*, or if the debtor knew of the intended misapplication of the proceeds by the trustee, and, in any way, wrongfully facilitated the accomplishment of that design, the instruments would be set up as existing and binding, but no such proof has been made in this case. On the contrary, as to the two principal bonds, the trustee required the payment. There was no medium of circulation but Confederate currency. But so far from doing so he sought payment in it. There is no testimony showing any willful combination on the part of White, Kerr & Goldsmith, with the trustee, which would justify an interference to hold them responsible for the act for which alone he should respond." The present case can be clearly distinguished from that just cited: First. In the latter case, there was

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one trustee, and "the legal title was in him." It is, to say the least, extremely doubtful whether in this case the legal title was passed by the act of the single trustee of law. Second. The authorities before cited put beyond a doubt that in equity there was an imperfect release of the mortgage in this case, a fact which does not appear at all in *Mayer v. Mordecai*, and which is of great importance. Third. In *Mayer v. Mordecai* the trustee made a demand for payment; in this case he did not. The statement of McBurney is, that he and the mortgagor made a treaty for the purchase of Dean Hall, and made an advance to him of Confederate treasury notes to enable him to satisfy the mortgage. Was this not "a wrongful facilitating," or improper combination in the sense of the ruling in *Mayer v. Mordecai*. Fourth. So much of the reasoning in *Mayer v. Mordecai* as is derived from the principle, that in this state the purchaser from a trustee is not bound to see to the proper disposition of the purchase money, has no application to this case. The equity which does bind the purchaser in that respect, is a much harder rule in favor of *cestuis que trustent*, than the one now under consideration. If there had been payment of money to Robertson, the complainant would have no case. The contention is that there was no payment. The ruling in *Mayer v. Mordecai*, that a creditor may accept in satisfaction of his debt something else than money, is not denied. While that proposition is perfectly true at law, the court entirely ignores what it had demonstrated and ruled in the previous part of the opinion, viz., that in equity such acceptance was a breach of trust. There was in that case an actual decree against the trustee for the breach of trust. To say that the purchaser has only to look to the legal title, is to destroy the jurisdiction of equity as between *cestuis que trustent* and third parties. Under such a ruling, a trustee to sell with consent of a *cestui que trust*, may

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without that consent make a good title to a purchaser who has full notice of the limitation of his power. The ruling was moreover entirely unnecessary for the protection of the purchaser from the trustee in that case, inasmuch as it was held that he would not be liable unless there was a fraud on his part or improper combination with the trustee to the prejudice of the *cestui que trust*. It is difficult to see how the conduct of the purchaser in this case can be held to be other than a fraud in the sense of a court of equity, and an "improper combination" with the trustee "to the prejudice of the *cestui que trust*," within the language of the rule as laid down in *Mayer v. Mordecai*. That the court did not apply its own rule in *Mayer v. Mordecai*, is no reason against its application now. It is obvious that the rule is itself in conflict with the whole current of decisions in the courts of England, of the United States, and of South Carolina, in all of which not the fraud of the purchaser, but his knowledge of the trust has been the ground of relief against him, granted to the injured *cestui que trust*. In the cases where purchases, for valuable consideration, have been set aside, there could be no question of actual fraud, nor does that question arise in the cases before suggested, where a sale by a trustee to sell with consent is set aside if the sale is made without consent, although the complete legal title passed by the sale. How far, then, is this decision of the state court, denying to a suitor a measure of relief thoroughly recognized in all courts of equity, to bind this court? The 34th section, Act 1789, provides "that the laws of the several states, except where the Constitution, Treaties, or Statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." The Act of May, 1792 (1 *Stat. at Large*, 92), provides that the modes of pro-

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ceeding in suits at equity shall be "according to the principles, rules, and usages which belong to courts of equity as contradistinguished from courts of common law." Under these statutes it has been uniformly held, since the establishment of the government, that the courts of the United States administer equity according to the general principles of English equity jurisprudence. "As the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in Massachusetts as in other states" (Per MARSHALL, C. J., *U. S. v. Howland*, 4 *Wh.* 116; also, *Robinson v. Campbell*, 3 *Wheaton*, 222). The settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law" (Per STORY, J., *Boyle v. Zacharie*, 6 *Pet.* 658; also, *Livingston v. Story*, 9 *Id.* 632). "The language of this section (sec. 34, Act 1789), can not, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity" (Per TANEY, C. J., *U. S. v. Reid*, 12 *How.* 363). "This court, and other courts of the United States, had repeatedly decided that the equity jurisdiction of the courts of the United States is independent of the local law of any state, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived" (*Dodge v. Woolsey*, 18 *How.* 347). "The equity jurisdiction of the Federal courts is the same in all the courts. . . . It is the same in nature and extent as the jurisdiction of England" (*Barber v. Barber*, 21 *How.* 592). "The equity jurisdiction and remedies conferred by the Constitution and statutes of the United States can not be limited or restrained by state legislation, and are uniform through-

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out the states of the Union. Hence the Circuit Court, for any district embracing a particular state, will have jurisdiction of an equity proceeding against an administrator (if, according to the received principles of equity, a case for equitable relief is stated), notwithstanding that by a peculiar structure of the state probate system, such a proceeding could not be maintained in any court of the state'' (7 *Wallace*, 425, Dec. 1868). "It is very clear that no law of a state can force an alien or a citizen of another state, to forego a remedy which would otherwise exist in equity, under the constitution and laws of the United States'' (Cropper v. Coburn, 2 *Curtis*, C. C. 473; see also *Fletcher v. Morey*, 2 *Story*, 555; *Gordon v. Hobart*, 2 *Sum.* 401; *Sawyer v. Oakman*, *U. S. Ct. Cl.*, *N. Y. Am. L. R.* V. 381). It is to be observed that *Mayer v. Mordecai* was decided since the filing of the bill in this case, at which time the equity now denied was plainly a part of the equity system in South Carolina. In the case of *Livingstone v. Jordan*, tried in this court, June Term, 1868, before CHASE, Ch. J. and BRYAN, J., the plaintiff was allowed to recover lands held by the defendant, under a conveyance made by the order of the court of equity of the state of South Carolina in 1862. It is submitted that the parties whose non-joinder is here objected are not indispensable.

III. Where the joinder of a party would oust the jurisdiction of the court, a court of the United States would be particularly disposed to construe the rules of practice so as to dispense with such party (*West v. Randall*, 2 *Mason*, 196; *Shields v. Barrow*, *supra*; *Payne v. Hook*, *supra*).

CHASE, Ch. J.—In this case the only question is as to parties, and we are called upon to meet it at the threshold. The objection of the want of parties may be taken at any time in the progress of a cause, and

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even in the appellate court. The objection will be disregarded whenever taken, if it appears that the parties are not necessary, or if, although convenient and under some circumstances necessary, they can not be made without depriving the court of jurisdiction. On the other hand, when it appears that no final decree can be made without material prejudice to the interests of parties not before the court ; the court will not proceed without them, even though such parties are beyond the reach of its process, or can not be made without ousting the jurisdiction. These are general rules, and they apply to courts of the United States as fully as to the courts of the states. In administering these rules, however, the courts of the United States are always careful to see that no citizen of a state, other than that in which the defendants reside, shall invoke their jurisdiction in vain, unless it is obviously impossible to protect the interest of the absent parties in their decrees. The only question here, is whether there is any such obvious impossibility in this case. It is objected, in the first place, that the partners of the defendant, McBurney, are indispensable parties. But it is plain upon the bill and answer that in all the transactions which form the subject of litigation, Mr. McBurney represented the firm, and we perceive no good reason why he may not be held to represent them in this suit. Most of these partners can come in and become parties to the bill, if they desire to do so. If they do not, it will be because they think their interests already adequately represented.

The court will not regard the absence of parties where interests are competently represented as an obstacle to doing justice by a decree between the parties actually before it.

The other objection is, that Elias N. Ball, though named as a party in the bill, has not been served with process. It is the same objection as the others, namely,

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want of an indispensable party. This gentleman, it seems, bought the property in litigation of the executors of Wm. A. Carson. He gave his bond, secured by mortgage upon the property, for the purchase money; subsequently, during the war, he sold to McBurney, and by arrangement between himself, McBurney, and the executors, McBurney paid the amount due the executors upon the bond in Confederate notes, and they thereupon surrendered the bond and discharged the mortgages. Subsequently, and since the war, Ball, it seems, has gone into bankruptcy. Under these circumstances we do not perceive that Ball is a necessary party. It does not appear that either he or his assignee in bankruptcy have any interests which will be prejudiced by a decree. At all events, as it seems to us, a decree may be made so as to do complete justice between parties before the court, and at the same time protect any rights which he or his assignee may appear to have. We can not regard him, therefore, as a necessary party.

We do not express this opinion without some hesitation, but our best judgment is, that it will receive the highest sanction, should the case go to the Supreme Court.

Whether this be so or not, it would be a positive wrong in this court to turn from its doors a suitor from another state seeking a remedy against citizens in this state, and thus deny to her a right secured by the constitution, upon a doubtful question in reference to parties. We would follow rather the example of Judge STORY, that great light of equity jurisprudence, and strain a point in favor of the constitutional right of citizens of the several states to sue the citizens of other states in the courts of the United States. It is a right too clear and too important to be lightly disregarded.

We shall therefore overrule the objection on account

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of want of parties, and continue the case for answer. It is no small satisfaction to know that any error we may now fall into will be corrected by a higher court.

Statement of the Case.

DISTRICT OF SOUTH CAROLINA.

*June Term, 1869.*TWO HUNDRED AND FIFTY BARRELS OF MOLASSES
AND OTHER MERCHANDISE v. THE UNITED STATES.

In a libel to decree goods forfeited by reason of a fraud on the revenue laws, Admiralty has jurisdiction although part of the goods have been landed before the seizure.

But if Admiralty had no jurisdiction, this must be pleaded, and the objection could not be made otherwise.

Under the Act of March 3, 1863, if it be attempted to practice fraud upon the revenue in regard to only a portion of the cargo imported, the whole of the cargo belonging to the party attempting to commit the fraud is forfeited.

On an appeal from the District Judge in an Admiralty cause to the Circuit Court, the trial in the Circuit Court is *de novo*; and the opinion of the District Judge can not be read.

The case is so fully stated and discussed by the District Judge that his opinion is given in full.

BRYAN, Dist. Judge.—The facts of this case are as follows: Some time in July, 1866, the schooner *Aid* came to Charleston from Matanzas, with a part of her cargo included in one invoice consigned to Salas & Co.

The invoice was produced by one C. P. Madan at Matanzas, who represented himself as the purchaser of the goods and swore to the correctness of the invoice required under the act of 1863 (2 *Brightly*, § 78, p. 177; 12 *Stat. at Large*, 737).

On the arrival of the vessel, T. P. Salas, as consignee, presented the invoice at the Custom House, and

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obtained an order for the entry of the goods; a part of these goods included in the invoice were landed and placed on drays and were removed to the store of Salas & Co. Suspicion having been excited, an examination of the goods took place, which resulted in the discovery that seven packages—viz., three hhds. marked in the invoice as containing sugar, contained boxes of cigars packed in the sugar, and four hhds. marked as containing sugar, contained each a quarter cask of brandy, packed in the sugar, and that out of thirty kegs marked California wine in the invoice, four kegs were found to contain rum.

Upon the first suspicion of fraud, the collector revoked his entry, and ordered the goods on board ship as well as those which had already been landed to be seized. This was done, and the goods seized on board the vessel, and those, together with all the goods contained in the invoice, were taken possession of by the collector, and held under seizure by him.

The libel was filed seeking to forfeit the whole of the goods contained in the invoice, on the ground that the invoice itself was false, and had been made up with intent to defraud the revenue, and all the goods contained therein and intended to be thereby entered, were therefore forfeited.

In this libel Salas & Co. intervened as consignees, and claimed all the goods which were not falsely packed, except twenty bags of coffee, as belonging to six or seven different shippers in Matanzas and Havana, and at their instance the goods were appraised, and they deposited in the registry of the court eighteen thousand eight hundred and twenty-one dollars and seventy-two cents, and took possession as agents of the alleged owners of the goods which were correctly stated in the invoice, except the twenty bags of coffee, which were claimed by one A. J. Gonzales of Charleston, and the said A. J. Gonzales, having executed the usual

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bond, received the twenty bags of coffee. (The false packages not having been claimed, were condemned and sold.) Subsequently six or seven claims by different persons as owners were put in, covering every portion of the invoice, excepting the false packages and the coffee, and claiming the goods as their property. A great deal of testimony was adduced to show that the ownership of the property was in the six or seven claimants, and that the false packages were shipped through mistake by Da Costa & Madan, the shippers in Matanzas; but Da Costa & Madan were examined by commission, and their answers established the fact that none of the parties claimants before the court, except Gonzales, were owners, or interested in any of the goods now sought to be forfeited, but, on the contrary, that F. P. Salas was the person who superintended the packing and shipment, he being at Matanzas at the time, and the name of Da Costa & Madan only used to clear the goods at the Custom House in Matanzas. One of these commissions was adopted by the claimants and used as their testimony, and by it it was very clearly shown that none of the parties claimants before the court, except Gonzales in the coffee, were either owners or at all interested in the goods.

No plea to the jurisdiction was filed, and the case was submitted upon the libel and answer and the testimony.

On the part of the claimants it was contended, First. That the Court of Admiralty had not jurisdiction, inasmuch as the goods were partly landed before the seizure. Second. That the libel was defective. Third. That under a proper construction of the act, only the articles falsely invoiced were forfeited, and not all the contents of the invoice.

On the part of United States it was claimed, that the whole of the goods mentioned in the invoice were forfeited; and it was insisted, first, that according

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to the case made by the pleadings and the proof, the goods were derelict, and introduced into the United States without an owner, as it was shown that Madan, who, by his oath on the invoice, claimed to have been the purchaser, was not the owner.

That Salas & Co. by their claim expressly denied the ownership, and stated that they were but the consignees or agents of the seven claimants, and that the testimony adduced and introduced by these claimants themselves proved conclusively that they were not the owners, and never had been interested in the cargo, and that the whole matter was an attempt to defraud the revenue either by F. P. Salas or by Salas & Co., and that the goods thus being without an owner, were rightfully seized by the collector, and the money deposited by Salas & Co., who had received the goods, was forfeited, as was also the bond given by Gonzales.

The act of March 3, 1863, § 1, 12 *Statutes*, 737, under which this libel is filed, provides that no goods, wares, or merchandise imported into the United States after July 1, 1863, shall be admitted to an entry, unless the invoice presented shall in all respects conform to the requirements thereinbefore mentioned, and shall have thereon the certificate of the consul, vice-consul, or commercial agent of the United States, nor unless said invoice be verified at the time of making such entry by the oath or affirmation of the owner or consignee, or the duly and authorized agent of the owner or consignee thereof; certifying that the said invoice and the declaration thereon are in all respects true, and were made by the person by whom the same purports to have been made, nor, except as thereafter provided, unless the triplicate transmitted by said consul, vice-consul, or commercial agent to the collector, shall have been received by him. The act requires that the invoice of goods to be imported, shall be made in triplicate and signed by the persons or person owning or shipping

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said goods, wares, &c., if the same shall have been actually purchased, &c., and requires that such invoices, at or before the shipment thereof, be produced to the consul, vice-consul, or commercial agent of the United States nearest the place of shipment, and shall have indorsed thereon a declaration signed by purchaser, manufacturer, or agent, setting forth that said invoice is in all respects true; that it contains the true and full actual cost thereof, and of all charges thereon, &c. The act further declares, "And if any such owner, consignee, or agent of any goods, wares, and merchandise, shall knowingly make or attempt to make an entry thereof, by means of any false invoice, or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which shall not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other *false* or fraudulent *practice* or *appliance* whatsoever, said goods, wares, and merchandise, or their value, shall be forfeited and disposed of, as other forfeitures for violations of the revenue laws." It is upon this last clause the present libel is founded. The first question raised by the defense in the argument, was as to the jurisdiction of the Admiralty Court, no plea to the jurisdiction having been filed.

The judiciary act of September 24, 1789, ch. 20, § 9, 1 *Stat. at Large*, p. 73, enacts that the District Court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas. The libel expressly states that seizure was upon water, navigable, &c. To this allegation, no plea denying the fact appears, but the objection is taken in the argument that this court is

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ousted of its jurisdiction, because it appears that a portion of the goods were landed before the seizure was regularly made.

Mr. Conkling in his 'Treatise on the Original Jurisdiction and Practice of the Courts of the United States,' at p. 592 of the third edition, lays it down as a settled rule "that the fact or the place of seizure is not put in issue by a general denial of the alleged forfeiture."

A claimant who wishes to avail himself of such an objection (to the jurisdiction), must therefore put in an answer in terms denying the allegation of the fact or the place of seizure, and he cites the case of the *Abbey* (1 *Mason*, 390). In that case Mr. Justice Story also placed his decision upon the further ground that a plea to the merits was an admission of the jurisdiction of the court, and he was also of opinion, that applying for and receiving the property on bond, was such an acknowledgment of jurisdiction as the claimant was not at liberty to controvert. If this be the true rule, the claimants in this case, having not only failed to plead to the jurisdiction, or to traverse the fact or place of seizure, but having applied to this court for the property in question, are certainly precluded (at this stage of the proceedings) from taking advantage of any want of jurisdiction.

But let us examine the facts and proofs as made out by the evidence, and we will find that the first seizure was regularly made upon the vessel and on the water. This was the first original and legal seizure; the subsequent collection and taking possession of the goods which had been landed, was but an incident properly following upon the original seizure made on the water. It is a well-established rule in all cases of concurrent jurisdiction that the court which first obtains and entertains jurisdiction over the same subject-matter, is entitled to go on and decide the whole case (9 *Wheat*. 535); and in this case the first seizure having been

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made on water, of a part of the goods, under an order to seize all the goods mentioned in the invoice, the jurisdiction of the Admiralty Court was obtained, and it has the right therefore to go on and decide the whole case involving the subject-matter—which subject-matter is the forfeiture of the whole of the goods mentioned and contained, or entered by means of that single invoice. But it is objected that the Admiralty and common-law sides of this court are of separate, and not concurrent jurisdiction, depending on the place of seizure as to which court shall entertain jurisdiction. This objection, in the present case, can not, it seems to me, have any effect. The object of the libel is to forfeit all the goods entered, or attempted to be entered by means of a single false invoice; a portion of the goods, it is true, were loaded before the fraud was discovered, but the seizure was actually first made of a portion on board the vessel; and the jurisdiction as to that portion is clearly in the Court of Admiralty; but the question whether the whole of the goods, &c., entered under the false invoice are, or are not forfeited, is necessarily involved in any decision which may be made, and if this be the question, how can the invoice be divided, whether tried in either or both sides of the court? The question involves the whole of the goods, and not a part, and necessarily, therefore, the court that first obtains the jurisdiction, must go on and decide the whole case; otherwise it might so happen that for the same act, which tainted the whole of the goods, a part might be condemned in one court, and a part released by another.

In contemplation of law (if our view be correct, the goods contained in the invoice are one inseparable—one indivisible entirety) it is to be regarded as if it were a chain, one portion of which, when seized, was on the vessel, and the other portion on land. Or, to take another illustration, a horse seized with his fore-

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feet on the land, and his hind-feet on the vessel. The material unity, the physical links creating one whole, may be wanting in this case, but as strong a legal unity exists as we have given in the illustrations of the horse or the chain.

In these cases it must be admitted that a seizure on the land or the water would give jurisdiction of the whole subject-matter, the chain or the horse, as in this case, the invoice, or all the goods contained in the invoice.

I am therefore forced to the conclusion that the first seizure having been made on shipboard, gave to the Admiralty proper, the instance side of the court, the jurisdiction of the whole, inasmuch as the permit to land, and the entry of the whole of the goods, was obtained upon a single invoice, they could not be separate, and the subsequent taking possession of the goods which had been landed, was but a part of the single act of seizure upon the waters.

The libel is in the usual form ; it sets forth the seizure and forfeiture, the reasons of such seizure, and prays process and condemnation.

The cause of seizure and forfeiture are set out in the words of the act, and this I think sufficient (U. S. v. Two Hundred Chests of Tea, 9 *Wheat*. 430 ; 8 *Peters*, 277 ; 7 *Peters*, 410).

The next question, and the main one in the case, is whether, under the act, all of the goods which were entered or attempted to be entered are forfeited, or only the false packages. This is a new question under the act, and now for the first time to be decided.

The words of the act, after requiring an invoice which shall be true in every particular, enacts that no goods, wares, or merchandise imported into the United States, shall be admitted to an entry, unless the invoice presented shall in all respects conform to the requirements of the act—shall have the certificate of

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the consul thereon, &c., nor unless said invoice be verified at the time of making such entry by the oath or affirmation of the owner or consignee or their agent, certifying that the said invoice and the declaration thereon are in all respects true—then declares—

“And if any owner, consignee, or agent of any goods, wares, and merchandise shall knowingly make or attempt to make an entry thereof by means of any false invoice, false certificate, or of any invoice which shall not contain a true statement of all the particulars required, or by means of any other false or fraudulent paper, or by any other false or fraudulent practice or appliance, said goods, wares, and merchandise, or their value, shall be forfeited.”

It would seem to me that the signification and reach of these words are very clear: no entry can be made except by a true and perfect invoice sought to be entered and passed through the Custom House; the whole of the goods mentioned in the invoice, or not mentioned, are then admitted to entry by virtue of the invoice, and if the invoice be false in any particular, and the agent, owner, or consignee, shall knowingly use it to obtain the entry, the whole of the goods, the entry of which was thus obtained, is forfeited.

An invoice, full and faithful in every particular, of all goods attempted to be passed through the Custom House, is the means and test used by the country to protect its revenue, its officers, and honest dealing, and the sin of a *false* invoice infects all the goods embraced in it, or sought to be embraced by it, or under cover of it. It is the false invoice that is punished, and the forfeit extends to everything embraced within it, or identified with it in the transaction. *No other* measure of forfeiture is indicated, no other qualification.

The great object of the law is to enforce the collection of the revenue, secure fair dealing with the officers

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of the customs, and protect honest trade by the instrumentality of an invoice true in all particulars, as to all goods sought to be entered by it or by reason of it, and with this object in view, the invoice is one, the sin against it one, and the measure of forfeiture can only be one and coextensive with it. The fraud, whatever it be, covers the whole invoice. It is the plague-spot that infects and corrupts everything embraced in it, or not embraced in it, yet sought by reason of it and by a foul practice connected with it, to be clandestinely introduced without payment of the proper duty, into the country in fraud of the revenue, in contempt of the government and its officers, against public morals, and at the expense of all honest traders.

Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of defendants. They are rather to be regarded as remedial in their character, and to prevent fraud, suppress public wrong, and promote the general good. They should so be construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects (*Taylor v. U. S.*, 3 *How.* 210; *Cliquot champagne*, 3 *Wall.* 145).

The objects of the act in question are to compel fair dealing, and to suppress attempted frauds upon the revenue, and attempted deceits practiced on revenue officers, as well as to prevent smuggling.

The smuggler does not simply defraud the revenue; he also defrauds and injures every honest trader who has to compete with him in the market, and who would scorn, for treacherous and dishonest gain, to stain his conscience with a false oath or soil his hands with profit slimed and fouled with perjury.

The previous acts of Congress seem to have been more strictly for the protection of the revenue—section 67 of the act of March 2, 1799, 1 *Stat. at Large*, 77, authorizes packages to be opened, and forfeits all

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goods which do not answer to the invoice. Section 21 of the act of August 30, 1842, 5 *Stat.* 525, authorizes collectors to examine packages, one at least in every ten, and if anything is found which was fraudulently in the package, the contents of the entire *package* is forfeited.

Thus stood the law up to the time of the passage of the act of 1863, now in question. The above acts seem not to have been sufficiently stringent and exacting to compel fair dealing, suppress frauds upon the revenue, and deceits upon officers, and the act was passed, and must be construed as cumulative and making an advance upon previous legislation, adding additional penalties, and providing ampler guards and restraints. It requires three invoices to be made under the sanction of an oath before the shipment of the goods, the certificate of the consul, &c., nearest the place of shipment, that such invoice has been produced to him, &c., and, thereupon, that the person producing the same, shall receive one of said triplicates, to be used in making entry of the said goods, and upon the production of this invoice, verified by the oath of the owner, consignee, or agent, an entry could be made of all the goods covered by the invoice. This was all that was required,—surely an easy requirement,—and if the parties acted honestly and fairly, every opportunity and means were thus given and afforded to facilitate honest and fair dealings; but in case the owner, agent, or consignee should act dishonestly or unfairly, he was properly punished by losing the whole of the goods he thus entered by his false invoice or any false device.

In *Cliquot's champagne* (3 *Wall.* 144), under this very section and act, it is said: "The court has to consider whether the case has been made out, and the three following points having been determined, the case is made out under the act. First. Did the owner,

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agent, or consignee of the goods mentioned in the invoice furnished to the collector, make or attempt to make an entry of said goods. Second. Did the agent, consignee, or owner make use of a false invoice or use any other false or fraudulent document or practice, in making or attempting to make such entry. Third. Did the agent, owner, or consignee know, at the time of making, or attempting to make said entry, that he was using a false invoice, or employing any false document or practice to make such entry." Apply these tests to the case before us: Salas & Co., who were certainly the consignees, if not the owners, made or attempted to make an entry of the whole of the goods mentioned in the invoice furnished to the collector. They presented and used a false invoice which is sworn to by Madan as the purchaser; the proof shows that F. P. Salas, one of the firm of Salas & Co., and he alone, either on his own account, or on account of his firm, was the purchaser, shipper, and packer of the invoice (except the twenty bags of coffee of Gonzales), and the invoice did not contain a true statement of the goods which were really entered or attempted to be entered under it.

Salas & Co., through F. P. Salas, who put up and shipped the invoice, and who used it before the collector to make the entry, knew that the invoice so used was false in all the above particulars. This fixes the case, as far as the invoice is the invoice of any purchaser, manufacturer, or owner, or the "duly authorized agent" of such purchaser, manufacturer, or agent.

The principle of the law, as we apprehend it, and as contended for by the claimants in this case, does not extend to the claim of Gonzales. He was not directly, as purchaser, manufacturer, or owner, the maker of the invoice, and it seems to the court that a fair interpretation of the whole evidence justifies the conclusion

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that Salas, the shipper, was not (in the language of the law) "his duly authorized agent." He was an intruder. He acted without the authority of Gonzales, and against his wishes and feelings.

He would not have made him his agent. If he had confided in him and made him his agent, and Salas had abused his confidence, it would have been his misfortune, and he could not have escaped the penalty of the law, so far as this court could relieve him. His remedy would have been against his betrayer, or a resort to the equity of the government administered by the Secretary of the Treasury.

With this exception the attempt here (as demonstrated by the evidence), was a most deliberate and skillfully contrived scheme to defraud the government of its revenue, in contempt of the officers of the customs, at the expense of all honest trade, and in shocking violation of commercial morals.

And to add to the enormity of the offense, when the fraud was detected, it was sought to cover it up, by perjury so unblushing, elaborate, and multiplied as not often poisons the atmosphere of public justice. The case, in its entire character, vindicates the equity and policy of the act, and the forfeiture of the whole venture is only a part, and a very insufficient part, of the punishment that should be visited upon conduct so dishonest and criminal.

The cause came on appeal to the Circuit Court, and was argued by Corbin, U. S. District-Attorney for the United States.

Porter & Conner for claimants.—I. The libel alleges a seizure on waters navigable from the sea, &c. The testimony shows that nearly all the goods were seized after they were landed. The first question is as to jurisdiction of the court. It is the place of seizure which decides the jurisdiction (*The Betsey*, 4 *Cranch*,

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443; 1 *Gallison*, 83). If seizure is on land, triable by jury; if on sea, by court (*La Vengeance*, 3 *Dalt.* 297; *The Sarah*, 8 *Wheat.* 394). The two jurisdictions are as distinct as if vested in different tribunals (*The Sarah*, 8 *Wheat.*). The libel charges seizure on navigable waters. Probata must correspond with allegata, and only so much can be condemned under these proceedings as is proved to have been seized on navigable waters (*Conkling's Treatise*, 515). It is for libellant to prove jurisdiction. The argument that objection should have been taken by plea in abatement hardly merits reply. It presupposes jurisdiction in a court of limited jurisdiction, and casts proof of negative on claimant. The case in 8 *Wheat.* shows the true rule. The moment it appears that seizure was on land, jurisdiction ceases.

II. As to the offense. The charge is, the attempt to make an entry by means of false invoice (§ 1, *Act of 1873*, 12 *Stat.* 737; 2 *Brightly's Dig., tit. Imposts*, § 78). All the preceding portion of section refers to what the invoice shall express. No allegation that this invoice does not conform to the act in all these respects. The whole charge is that seven packages included in the invoice were fraudulently packed. As to them, the invoice is false. We concede that these seven packages are justly forfeited, but we deny that the fraudulent character of these packages can affect the rest of the goods, wares, and merchandise included in the invoice. As to these latter, there is no attempt to enter them by means of a false invoice. The argument of District Attorney is that no matter how regular and true may be all the rest of the invoice, and all of the goods included therein, they are nevertheless forfeited, because in bad company. He extends the act by construction, and condemns all as fraudulent because a part is. If the false could not be separated from the true, the condemnation of both might be asked with some show of reason, but where they are distinct and separable, the blending

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of innocent and guilty in one general condemnation seems repugnant to common sense and common justice. Such conclusion ought to rest on express enactments, not upon construction. The words of the act do not forfeit all the goods included in the invoice. It says, "if any owner of any goods, wares, or merchandise, shall knowingly make an entry thereof by means of any false invoice, said goods, wares, and merchandise shall be forfeited." The object of the legislation was to insure that the goods entered on the invoice should be correctly described, and the fair and reasonable interpretation of the act is to forfeit the goods which are not correctly described on the invoice. The construction contended for by the District-Attorney, gives no protection to the government. All that a fraudulent shipper has to do is to place his fraudulently packed goods in separate invoice, and the government is limited in its forfeiture to the falsely packed goods. The construction contended for by the District-Attorney, would not defeat the guilty. It will only punish the innocent. The act of 1823 (1 *Brightly's Dig.* 366) authorizes shipper to include all articles shipped by him in one invoice; shipper may include in same invoice goods of twenty different people, and the fraud of one will forfeit the property of all. The express companies transporting goods from Europe to New York, include in one invoice, we suppose, the goods of fifty different owners, each trip of the steamer: shall a falsely packed package forfeit the whole invoice? "A construction which would sanction so glaring an invasion of the law ought in no case to be adopted" (*Fur Co. v. U. S.*, 2 *Peters*, 367.) The court below felt the injustice of such construction, and in the present case exempted from forfeiture Gonzales' goods. Yet they were all included in the same invoice, entered by the same party, and seized in the same manner. But two constructions can be placed upon the act: one that it

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forfeits all the goods included in the invoice ; the other that it forfeits only the fraudulent packages. The exemption of Gonzales' goods shows the judgment of the court that the forfeiture does not extend to the entire invoice. It must therefore attach only to the fraudulent packages. A reference to the language of preceding acts and the decisions under them will sustain the view we take (see act of 1799, 1 *Brightly's Dig.*, p. 409, § 386). The goods, wares, and merchandise forfeited, are the goods, wares, and merchandise, invoiced below cost (U. S. v. Wood, 16 *Peters*, 342). Under act of 1799 (§ 67, 1 *Brightly's Dig.*, p. 409, § 387), if the packages shall be found to differ from the entry, "then the goods, wares, and merchandise contained in such packages shall be forfeited." Under act of 1830 (§ 4), all that is forfeited is the package which does not correspond with the entry (1 *Brightly's Dig.*, p. 367, § 206 ; see act of 1832, 1 *Brightly*, p. 413, § 405 ; see act of 1842, 1 *Id.* p. 413, § 206 ; see act of 1842, 1 *Id.* p. 413, § 407 ; see act of 1799, 1 *Id.* p. 374, § 239). When the acts intend to forfeit all that is connected with the fraud they say so, in unmistakable terms. "The whole contents, together with the envelope, shall be forfeited" (Act of 1864, § 1 ; 2 *Brightly*, p. 183, § 106). "All invoices and packages whereof any such articles shall compose a part, are hereby declared liable" to forfeiture (Act of 1857, § 1 ; 1 *Brightly*, p. 366, § 200).

CHASE, Ch. J.—This cause comes here on appeal from a decree of condemnation pronounced by the District Court against certain merchandise, as forfeited to the United States, by reason of attempted fraud upon the revenue.

The decree of condemnation is issued against the whole cargo of the British schooner, and mentioned in an invoice of goods consigned to Salas & Co., and

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imported into Charleston on July 2, 1866, from Matanzas, in the island of Cuba.

The packages falsely entered upon the invoice were four hogsheads entered as containing sugar, each of which in fact contained a cask of brandy, or distilled spirits, packed in sugar; and three other hogsheads entered as sugar, each of which in fact contained a case of segars, packed in sugar; and four quarter casks entered as wine, each of which in fact contained rum or distilled spirits. There were twenty-five hogsheads entered as sugar in all, of which seven were unlawfully entered as first stated, and thirty quarter casks entered as wine, of which four were unlawfully entered. The rest of the hogsheads of sugar, the rest of the quarter casks of wine, and the whole remainder of the cargo, consisting of two hundred and fifty barrels and twenty-three tierces of molasses, one hundred and thirty-one barrels of sugar, and a large quantity of other goods, such as maccaroni, olive oil, sugar, syrup, and the wine, seems to have been truly entered upon the invoice. The whole invoice was consigned to Salas & Co., of Charleston. The evidence excludes all reasonable doubt that the goods, except twenty bags of coffee, were purchased by or for account of Salas & Co. in Cuba, either through Da Costa & Madan, or with funds furnished by that firm. The whole cargo was shipped by Da Costa & Madan, under the direction of F. P. Salas, and bills were drawn by them on Salas & Co. for the amount of it.

The claims put in by other persons are unsupported by the proofs. It is remarkable that Salas & Co. disclaim ownership, and claim only as consignees. As consignees, however, this firm, through one of its members, F. P. Salas, represented the invoice as true, made an entry of the goods by reason of it at the custom-house, Charleston, and obtained the usual permit to land part of the goods, for which he was prepared to

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pay the duties. A part of these goods were landed and conveyed to the house of Salas & Co. While the Aid was being discharged under the permit, it was discovered that a part of the goods were fraudulently entered in the invoice. The entry and permit were, therefore, revoked, and all the goods mentioned in the invoice, whether remaining on board the schooner, or landed, were seized, and the libel now before us was filed for condemnation. These two grounds are relied upon for the reversal of the decree of the District Court:

First. That the seizure of part of the goods was upon land, and that as to this portion, there is no jurisdiction in admiralty. Second. That the forfeiture contemplated by the statute is of the fraudulent packages only, and not of the whole invoice.

To the first objection, I think it is a sufficient answer that no objection to the jurisdiction is taken in the claim and answer of Salas & Co. But if the objection were not too late, it would be difficult to sustain it. The goods were in the act of being discharged. The discharge had not been completed; a large portion was still on board the vessel. The fraud was not discovered until a part had been landed. Under the circumstances, it is not unreasonable to regard that portion of the goods which had been put on shore as still a part of the cargo of the vessel, and the whole as subject to the jurisdiction of the admiralty.

The other objection must also be overruled. I shall not now enter into the history of the progressive severity with which Congress has enforced, by forfeitures, the payment of duties on imported merchandise, first providing for the forfeiture of the particular articles imported in violation of law, afterwards by forfeiture of the package in which these articles were contained, and finally enacting the law of March 3, 1863.

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This last act provides that no goods, wares, or merchandise imported after July 1, 1863, shall be admitted to entry, unless on production of the required invoice, and compliance with the other terms prescribed, and that if any owner, consignee, or agent of any goods, wares, or merchandise shall attempt to make entry of them by false invoice, said goods shall be forfeited.

What goods? The particular articles fraudulently imported? That will hardly be contended, for it would mitigate the already existing penalty; and the policy of Congress, in view of the exigencies of the revenue, and of possible fraud, was to retain, not diminish, the former surety. Was it the packages in which the fraudulent articles were concealed? This construction would leave the former law, in this respect, unaltered, while it was the manifest purpose of Congress to alter it, and augment the penalty. No construction will carry out this obvious design, except that which the words of the law manifestly suggested, and which made the penalty apply to the whole invoice owned or shipped by Salas. This construction condemns all the goods included in the invoice, except the twenty bags of coffee belonging to Gonzales. The decree of the District Court will, therefore, be affirmed.

Statement of the Case. -

DISTRICT OF SOUTH CAROLINA.

June Term, 1869.

UNITED STATES v. MORRISON.

The policy of the United States requires postmasters and their sureties to be liable in all events: no accident or misadventure will excuse them.

The only exceptions are those provided for by the acts of congress ; being losses occasioned by the Confederate forces or guerrillas, or such as are occasioned by any other armed forces.

No surrender of the property of the post-office department to the Confederate government under any other than the coercion of armed force can excuse a postmaster.

The whole existence of the Confederate government was a continued rebellion against the lawful government of the United States ; and no one can be protected by the sanction of its authority save in acts of war.

The national government conceded belligerent rights to the armies of the Confederate States, and acts of a strictly military character, performed under military authority may be protected by this concession.

Statement of the Case.

Morrison was appointed postmaster of the United States at Winnsboro, South Carolina, and as such executed the proper official bond with sureties, on December 20, 1859.

His accounts were settled by the United States Post-office Department up to May 31, 1861, on which day after allowing him his legal commissions, &c. he was found indebted to the United States in the sum of seven hundred and seventy two dollars and twenty seven cents.

Mr. Corbin's prayer to the Court.

In 1867, the United States brought suit against him for this sum, and the cause came on before a jury.

After proving the acceptance of the office, the execution of the bond and the statement of the account finding the above balance against him, the government rested its case.

The defendant then offered testimony to prove that he had received an order through the mails from the Post-office Department of the Confederate States, under whom he continued to exercise the functions of postmaster, to forward to Richmond all stamped envelopes of the United States in his possession, and that having stamped envelopes to the amount of fifty one dollars and seven cents, he accordingly did forward the same to Richmond.

He further proved that he had carefully kept United States postage stamps entrusted to him while postmaster before the war, to the amount of one hundred and thirty one dollars and sixty two cents, but that soldiers of General Sherman's army, passing through Winnsboro in 1865, had broken into his house and destroyed those stamps. He therefore claimed a credit in his account for these two amounts.

Corbin, U. S. Dist. Atty., for the government.

Conner, for the defendant.

At the conclusion of the argument and previous to the charge of the Chief Justice, Mr. Corbin submitted the following prayer to the court:

The court is requested to charge the jury, 1. That if the defendant Morrison accepted the office of postmaster at Winnsboro, S. C., on December 20, 1859, and bound himself to keep safely all the public money collected by him or otherwise at any time placed in his

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possession and custody, till the same was ordered by the Postmaster-General to be transferred or paid out, . . . and faithfully account with the United States in the matter directed by the said Postmaster-General, for all moneys, postage stamps, stamped envelopes, &c., &c., which he as postmaster, or as agent and depository, should receive for the use and benefit of the postmaster department; and if he entered upon the duties of that office, and continued therein up to May 31, 1861, and received the salary and commissions allowed by law therefor, he must be held strictly to the undertaking in his bond; and if the evidence shows that during his continuance in said office, as postmaster, there came to his hands property of the United States to the amount of seven hundred and seventy-two dollars and twenty-seven cents, which he has not accounted for, or paid over, as required by the Postmaster-General, then a verdict for said amount, with interest at the rate of six per cent. from the date of the default, must be rendered for the plaintiff.

2. That the defendant Morrison did, in pursuance of the order of the Post-office Department of the Confederate States, forward to that office at Richmond all or any portion of the property of the United States, to wit, fifty-one dollars and seven cents in stamped envelopes, is not a proper accounting to the government of the United States therefor, and does not bar the right of the United States to recover judgment against said defendant and his sureties for the same.

3. That said Confederate States or government was an unlawful combination of divers persons, engaged in unlawful insurrection and rebellion against the government of the United States, and within the territory thereof, unlawfully usurping the powers of government, and as such it continued to be unrecognized as having any lawful existence, till suppressed by the military power of the United States; hence neither said

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Confederate Government, nor its officers, or agents could originate any legal action, or issue any order which the defendant Morrison was bound to obey.

4. That the surrender of the fifty-one dollars and seven cents, in stamped envelopes belonging to the United States, by defendant Morrison, on the order of the Confederate Government, received by him through the agent of the mails, was not a surrender or yielding up of the United States' property under the pressure of irresistible force, but a violation of the condition of his official bond, unauthorized, and contrary to law.

5. That the destruction of the one hundred and thirty-one dollars and sixty-two cents in postage stamps, by the United States' forces, is no defense to this action, unless he, Morrison, postmaster, shows affirmatively :

1. That he was loyal to the government of the United States.

2. That such destruction occurred without his negligence or default.

Chief Justice CHASE then charged the jury as follows :

Gentlemen of the Jury :—We shall decline to give the instructions asked for by the counsel for the government, except so far as they are embodied in what we shall now proceed to say. The policy of the government of the United States, in respect to the business of the post-office department, requires that principals and sureties upon the bonds of postmasters shall be held liable at all events. The decisions of the courts have constantly affirmed this doctrine. Neither robbery, nor theft, nor misadventure of any kind, except, perhaps, when caused by the action of the government itself, will excuse a postmaster or his sureties. It is admitted, in accordance with this principle, that the present defendants are liable to the amount of three hundred and seventy dollars. But, it is claimed, that

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the postmaster, and, of course, his sureties also, are relieved, as to certain other liabilities assessed against him by the government.

This relief, under the acts of Congress, can arise only in two ways either through acts of Confederate troops, or through acts of the national troops.

No relief could arise under any authority of the Confederate government. That government was founded in an attempt to throw off the authority of the United States, and establish an independent republic. If that attempt had succeeded, all transactions authorized by the Confederate government must doubtless have been recognized as lawful. But in the absence of success, that government was itself unlawful. Its whole existence was a continued rebellion against the lawful government of the United States. No one could be protected in any action by the sanction of its authority. The only exception to this are acts of war. The National Government, in its exercise of a sound discretion, conceded belligerent rights to the armies of the insurgent states during the late civil war; and acts of a strictly military character, performed under military authority, may be protected by this concession. This, however, has nothing to do with the present case. It is not pretended that the postmaster failed to account to the government in consequence of any military orders; nor, indeed, would military orders for such a purpose constitute a defense.

But the congress of the United States, sensible of the hardships which must attend the vigorous enforcement of the rule to which we have adverted, against postmasters for defaults occasioned by the late civil war, has thought fit to afford them a certain measure of relief. The act of 1864 authorizes the Postmaster-General to credit postmasters for certain losses occasioned by the Confederate forces or rebel guerrillas. This relief is confined to loyal postmasters. The act

Charge to the jury by CHASE, Ch. J.

of 1865 extends the same relief to cases where the losses are occasioned by armed forces other than those of the so-called Confederate States.

If you find, therefore, that part of the loss in the present case was occasioned by armed forces other than those of the Confederate States, at the place where this post-office was established, that is to say, at Winnsboro, you will deduct the amount of such loss from the whole amount of the account stated.

The whole law upon the subject may be briefly stated thus: You are bound to take the amount stated in the account furnished from the Post-office Department as the true amount due from the principal defendant. Neither he nor his sureties are excused from the payment of that amount by any loss through fraud or force, except under the acts of Congress referred to.

For losses described by these acts, the defendants are not responsible. If you find, therefore, that any part of the loss of the principal defendant was occasioned by the presence of armed forces other than those of the insurgent states, you will deduct that amount from the sum stated in the post-office account, and render a verdict for the balance.

In response to a request of the District-Attorney, the Chief Justice further charged the jury that interest upon the amount found due should be computed from the time of default of payment, that is to say, from June 30, 1861.

The jury retired, and after being out about an hour, the court was informed that one of the jurors had been taken sick. The jury returned into court, when the foreman reported that they were unable to agree upon a verdict. A mis-trial was ordered, and the jury discharged.

Statement of the Case.

DISTRICT OF NORTH CAROLINA.

June Term, 1869.

THE LORD.

IN ADMIRALTY.

The master of a vessel may lawfully refuse to deliver goods to the consignee which, having been attached on his vessel, are carried to the port of consignment under an agreement with the sheriff that they should be returned.

Goods are being shipped from N. to W., some of which are on the wharf, some on the steamer. At this time the sheriff levies an attachment on them, but those on the steamer being covered up by other goods, and difficult to remove, he allows the captain to proceed with them under an agreement that he will bring them back. When the steamer arrives at W., the consignee tenders the freight, and demands the goods. The captain might lawfully refuse to deliver them up.

Statement of the Case.

Moore shipped certain cases of merchandise at New York by the steamer Lord, consigned to himself at Wilmington, North Carolina, and received bills of lading for them. After part of the goods were stored in the hold of the vessel, and the remainder were on the dock about to be so stored, the sheriff of New York appeared with an attachment against the goods of Moore, and took possession of the cases on the dock, and was about to have the vessel discharged so as to get possession of those in the hold. To save time, trouble, and expense, the New York agent of the ship gave the sheriff a receipt for the goods on board, agreeing to bring them back from Wilmington, whither

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she was then bound, and deliver them to him on his return.

On her arrival at Wilmington, Moore's agent went on board the ship, offered the freight money due by the bills of lading, and demanded the goods.

The master declined to deliver them to the said agent, but took them back to New York and delivered them to the sheriff, the latter paying charges and giving his receipt therefor.

Soon after that Moore produced to the sheriff an order from the plaintiff in the attachment countermanding it, and that officer then delivered the goods to Moore, he paying sheriff's fees, costs, and charges.

Moore then filed his libel in the District Court of the United States for the district of Cape Fear in the district of North Carolina, against the steamer in the port of Wilmington, claiming to recover the full value of all the goods shipped and taken by the sheriff's attachment, which value was eight hundred and twenty-five dollars and eighty-eight cents.

The District Court decreed that Moore was not entitled to recover for the value of the goods seized by the sheriff on the dock, but that he should be paid such sum as it cost him to get back from the sheriff the goods which had been brought to Wilmington by the ship, and which the master there refused to deliver to Moore's agent, but carried back to New York, and delivered to the sheriff.

This amount was fixed by agreement of counsel at five hundred dollars, and the court pronounced a decree from that amount against Ward, the master and claimant of the steamer, from which decree is this appeal.

Person & French, proctors for libellant.

A. M. Waddell, proctor for reclaimant.

Opinion by CHASE, Ch. J.

CHASE, Ch. J.—This is a case of affreightment. The libellant purchased certain goods in New York, which were shipped by his agent on the steamer Charles W. Lord for Wilmington. Bills of lading were given, in the usual form, by the master of the steamer.

Before the lading of the goods had been completed, a writ of attachment was issued from one of the courts of New York, in favor of a creditor of the libellant. Under this attachment, the sheriff seized the goods not actually on board, and levied the writ upon the remainder of the goods already in the hold of the vessel. As it would occasion great inconvenience to discharge the cargo for the purpose of taking actual possession of the goods in the hold, the sheriff consented to receive a stipulation from the master of the vessel, and from the agent of the libellant, for the safe return of the goods from Wilmington to New York, and their delivery upon arrival at the latter port to him.

Under the circumstances, the steamer proceeded to Wilmington, where the freight money was tendered by the libellant, and delivery of the goods demanded. The master of the steamer refused compliance with this demand, and carried the goods to New York, and delivered them to the sheriff in fulfilment of his stipulation.

Subsequently, the libellant effected a compromise with the attaching creditor, and the goods were delivered into his possession in New York.

Under these circumstances, damages are claimed by the libel for non-delivery of the goods at Wilmington according to the bills of lading.

The only question presented for consideration by the court is whether the master of the steamer was excused from compliance with his contract with the libellant by action of the sheriff, under the writ of attachment, and the stipulation made with him.

Undoubtedly it was the right and duty of the sheriff under the writ of attachment to seize the goods de-

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scribed in the writ. He had the right to remove all the goods on board, so far as such removal was necessary to reach and take possession of those goods. The authorities cited to us sufficiently establish the law of New York to be, that the sheriff, instead of pursuing this course, had a right to take from the master a stipulation for the safe return of the goods. The custody of the master, during the time he had possession under this stipulation, was the custody of the sheriff. He had no more right to deliver the goods to the libellant at Wilmington than the sheriff would have had to convey the goods to that port and make the delivery. The right of the creditor in attachment displaced, for the time being, the right of the purchaser and assignee of the goods.

It follows that the master was under no obligation to deliver the goods when demanded by the libellant.

The decree of the District Court must be reversed, and the libel dismissed : and it is ordered.

Statement of the Case.

DISTRICT OF NORTH CAROLINA.

June Term, 1869.

DEWEES' CASE.

An indictment against a member of Congress for unlawfully franking, need not charge that he franked any letter as a member of Congress, nor that he was a member of Congress when the offense was committed.

If this were otherwise, the indictment charging that "J. T. D., member of congress," committed the offense, sufficiently charged that he did it whilst a member of congress.

In an indictment for a statutory offense, it is sufficient if the offense be substantially set forth, though not in the precise words of the act.

An allegation in an indictment that a member of congress franked letters, not written by himself, namely, envelopes which he consented should be used by one C., for the purpose of transmitting through the mail certain matter properly chargeable with postage, sufficiently excludes the possibility that the letters were written by the order of the defendant on the business of his office.

Though it is *unlawful* for a member of congress to frank envelopes to be used in transmitting printed circulars through the mail, it is not *penal*. Such do not come within the meaning of the word "letters" in the act of 1825.

Statement of the Case.

John T. Dewees, the representative in the Congress of the United States from the Raleigh District in the years 1868-9, made some arrangement with one Cunningham, by which the latter was enabled to transmit his business circulars through the mails without paying postage thereon.

The circulars were printed, sealed up in envelopes, franked by Dewees as member of congress; or the

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franked envelopes were furnished by Dewees, and used by Cunningham, it did not appear which.

For this he was indicted in this court, and found guilty by a jury.

Whereupon he moved in arrest of judgment that the indictment described no offense for which punishment was denounced by the laws of the United States.

CHASE, Ch. J.—An indictment was found against the defendant, charging that he, a member of congress, franked letters, not written by himself, namely, envelopes which he consented should be used by one Cunningham for the purpose of transmitting through the mail, free of postage, certain mailable matter properly chargeable with postage; which franked envelopes were used by Cunningham. Upon this indictment the jury found the defendant guilty.

A motion has been made in arrest of judgment. The ground of the motion is that the act described in the indictment did not constitute the offense of franking letters in violation of law within the meaning of section 28 of the act of March 3, 1825. It is more particularly insisted, first, that the indictment does not allege that Dewees franked any letter as a member of congress; second, that it does not negative the conclusion that the letters were written by others under his direction, and on the business of his office; and, third, that a printed circular letter, contained in a sealed envelope, is not a letter within the meaning of the act of 1825.

That act provides that, "if any person shall frank any letter or letters other than those written by himself, or by his order, on the business of his office, he shall, on conviction thereof, pay a fine of ten dollars."

The first objection may, therefore, be easily disposed of. The penalty is pronounced against any person who commits the offense of unlawful franking. It was

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sufficient, therefore, to allege that Dewees committed the offense without alleging that he was a member of congress. If this were otherwise, we think that the indictment which charges that John T. Dewees, member of congress, committed the offense, is a sufficient allegation that he was a member of congress when the offense was committed.

Nor do we think that more weight should be given to the second objection. In an indictment for a statutory offense, it is sufficient that it is substantially set forth, though not in the precise words of the act.¹

In the present case the fact that the letters were not written by the order of the defendant on the business of his office, is sufficiently negatived by the affirmation that the envelopes which he franked were used, with his consent, by Cunningham, for the purpose of transmitting free through the mail matter chargeable with postage.

The only serious question is that presented by the third objection, that the franking of envelopes for the transmission of printed circulars through the mail is not the franking of letters within the meaning of the act.

It is not denied that the franking of these envelopes, for the purpose intended, was a violation of the law.

The franking privileges of members of congress cover only correspondence to and from them, printed matter issued by authority of Congress, speeches, proceedings and debates in Congress, and printed matter sent to them. It is very clear that the circulars franked by the defendant did not come within either of these descriptions. The franking, therefore, was unlawful.

But, is it made a penal offense by the act of Congress? The answer to this question depends on the meaning of the word "letter" as used in the act.

¹ U. S. v. Batchelor, 2 Gall. 15 ; U. S. v. Pond, 2 Cur. 265.

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It is strenuously insisted on behalf of the defendant, that the word means only a manuscript letter. In support of this view, it is urged, that the act itself in denouncing a penalty for franking letters other than those *written* by the franker, implies that the letters, of which the franking is made an offense, must be written letters, and this view seems not unreasonable.

It is further insisted that this construction is supported by the provisions of the act of 1863,¹ describing mailable matter as consisting, first, of letters ; second, of regularly issued printed matter ; and third, of miscellaneous matter. In these classes of mailable matter, the first alone embraces correspondence, wholly or partly in writing. The other classes embrace printed matter, with an addition, in the third class, of book manuscripts, and proof sheets, corrected or uncorrected.

This definition of letters as correspondence, wholly or partly in writing, necessarily excludes from the definition printed circulars, whether in the form of letters or otherwise. It does not leave us at liberty to say that the word letter or letters, other than those written by himself or by his order, in the above section of the act of 1825, includes any letters, not partly, at least, in writing. The indictment in this case, does not charge that the letters described in it were written, either wholly or in part, and the proof before the jury was that the circulars alleged to have been franked were printed.

It follows that the indictment does not describe an offense within the meaning of the penal provision of the act of 1825. It describes only an unlawful act to which Congress has not seen fit to annex a penalty. No judgment, therefore, can be entered upon the verdict.

The motion in arrest must be granted.

¹ 12 U. S. Stat. 705.

Statement of the Case.

DISTRICT OF NORTH CAROLINA.

June Term, 1869.

ANDERSON v. THE BANK.

The late civil war did not revoke an agency in the Southern States, established before the war, by a citizen of one of the Northern States.

But such an agent was bound to act with due care and diligence.

The receipt of Confederate treasury notes in payment of a debt due to a citizen adhering to the National Government was not the exercise of such diligence.

Such receipt did not discharge the debtor from his debt, though paid in form, and the notes delivered to him as paid by the agent, were not paid in fact.

Nothing could discharge him except ratification of the acts of the agent or voluntary release by the creditor, or actual payment in lawful money.

The agent can not be sued along with the debtor for the amount of the debt, without an averment of the insolvency of the debtor.

But this having been done, the plaintiff may either amend his bill and charge the insolvency of the principal, or he may, under the circumstances, take a decree against the agent for the value of the Confederate currency paid by the debtor, and a further decree against the debtor for what would then remain due after crediting this on the debt.

If the plaintiff is not content with such a decree, he may amend his bill by alleging the insolvency of Harris and loss of his debt through the unauthorized action of the bank.

Statement of the Case.

Anderson lived in Kentucky and employed Young, also a citizen of that state, to sell mules for him in North Carolina. In August, 1860, Young as his

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agent sold mules to Harris in North Carolina, and took the notes of Harris for the purchase-money, payable to Anderson in January, 1861.

Immediately after receiving the notes, Young deposited them in the Bank of Cape Fear at Raleigh, North Carolina, for collection, having first endorsed them for Anderson, as his agent, to Jones, cashier of the bank.

Harris did not pay the notes when they became due, but on January 22, 1861, paid part of one of them, which amount the bank remitted to Anderson by mail, less commissions and exchange.

On February 22, 1861, Harris made another payment on account, which amount the bank likewise remitted by mail to Anderson, less commissions and exchange.

In November, 1862, Harris paid to the bank the balance due on the notes, with interest to the date of payment in Confederate treasury notes, and received from the bank his two notes to Anderson.

The currency so received was placed by the bank to the credit of Anderson on special deposit, and subsequently invested by it in Confederate seven per cent. bonds, which bonds were placed in a package, among the special deposits of the bank marked, "Jno. Jay Anderson, Side View, Montgomery County, Kentucky."

During the fall of 1862 Young was in Raleigh, and went with Harris to the Bank of Cape Fear, where Harris paid the notes in Confederate currency to Jones in the presence of Young. Whereupon Young demanded the amount so paid of Jones, who declined to deliver it to him on the ground that he had no authority from Anderson to collect it. Young claimed to have authority from the fact that Harris had given him the notes as agent for Anderson, and that he as such agent had endorsed and delivered them to Jones for collection.

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As soon as the war terminated, and communication between Kentucky and North Carolina was restored, Anderson repudiated the action of the bank in securing Confederate currency for his notes, and filed his bill in equity against Harris and the bank, charging that the notes never had been paid; that they had been delivered to Harris without authority by collusion between the bank and Harris to defraud him.

The respondents put in separate answers.

The bank admitted the reception of the notes for collection. Stated that it had remitted to Anderson all collections as long as it was possible to do so, and that in receiving payment of the notes in Confederate currency, it had acted with due care and diligence in protecting Anderson's interest, exercising the same discretion as was used by the best business men in the community in the transaction of their own business, and just as much as had been at that time exercised by prudent executors, guardians, and other fiduciaries, and denied the charge of collusion.

Harris, in his answer, admitted the main facts as charged, denied collusion, and claimed that Young as agent of Anderson had ratified his payment to the bank.

Young testified that on his visit to Raleigh in 1862, he was no longer agent of Anderson, that relation having terminated the year before.

Phillips & Buttle, for complainant.

Rogers & Bachelor, for the bank.

E. G. Haywood, for Harris.

CHASE, Ch. J.—This is a suit in equity by the plaintiff, a citizen of Kentucky, against the defendants, who are citizens of North Carolina. The substance of the

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case is that Anderson having sold some mules to Harris, received his bonds for the price, and deposited them in the bank of Cape Fear for collection, late in 1860, or early in 1861. Subsequently, the bank received partial payments, which were remitted to Anderson. The civil war broke out soon afterward, and there were no further payments until November, 1862, when the balance on the first bond was paid. The second bond of \$450, and interest, were paid in full early in 1863. These payments were made in Confederate notes, and the bonds were surrendered to Harris.

The bill charges that there was collusion between the bank and Harris in this attempt to satisfy the bonds by payment in Confederate currency, and prays that the defendant may be compelled to satisfy the debt due from Harris. The bill does not allege that Harris is insolvent, and the charge of collusion is denied by the answer, and not supported by proof.

There is no doubt that the bank was constituted his agent for collection by the plaintiff, and it is not denied that its duties as such were faithfully fulfilled until after the commencement of the civil war. The agency of the bank was not terminated by the breaking out of hostilities. The bank might, indeed, have declined to act further under its agency, and might have retained the bonds for delivery to the plaintiff, but if it acted at all, it was bound to act with care and diligence. In our opinion, the receipt of Confederate notes, in payment of a debt due to a citizen of a state adhering to the National Government, was not the exercise of such diligence.

Such receipt, however, did not discharge the debtor from his debt. The bonds, though paid in form and delivered to him as paid by the agent, were not paid in fact. He still remained liable for the full amount of the debt. Nothing could discharge him except ratification of the acts of the agent, or voluntary

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release by the creditor, or actual payment in lawful money.

No discharge, such as is here described, is alleged. The evidence is that the creditor disavowed the unauthorized acts of the agent and insisted on payment in full.

• But he can not recover damages for consequential loss without proof of such loss. If the debtor is not discharged, and is able to pay the debt, and no loss has arisen to the creditor from the acts of the bank, it is difficult to see how the creditor can establish any right as against that corporation. Rights and remedies as between the bank and the debtor are matters between them, and not between the bank and the creditor, unless loss has arisen to the creditor. But the bill contains no allegation of the insolvency of the debtor or of other loss.

In the present state of the pleadings, therefore, the particular relief prayed for in the bill can not be granted.

But since the bank is undoubtedly liable to the debtor for the value of the Confederate notes received from him, and the debtor remains liable to the creditor for the full amount of the bonds, we think that, to avoid multiplicity and circuitry of action, under the general prayer for relief, and upon the whole case, a decree may be made for the payment by the bank to the plaintiff of the amount due to Harris, and against Harris for the balance remaining due after crediting that amount upon the bonds.

If the plaintiff is not content with such a decree, his bill, in its present form, must be dismissed ; but if he chooses, he may amend by alleging the insolvency of Harris, and loss of his debt through the unauthorized action of the bank (*Emerson v. Mallett*, *Phill. Eq. R. (N. C.)* 236 ; *State ex rel. Cummings v. Webone*, 2 *Phill. (N. C.)* 315 ; *Liability of Guardian*, see *Conf. Notes*).

Statement of the Case.

DISTRICT OF NORTH CAROLINA.

June Term, 1869.

WHITELY, STONE & Co. v. WILLIS D. RIDDICK.

Land having been sold under execution upon a judgment of the United States Circuit Court, that court will not, upon motion to that effect, appropriate the proceeds to an older judgment of a state court. The holder of the older judgment should issue his execution and sell the land. .

SEMBLE : a purchase of land sold under an execution from the United States Circuit Court, does not take the land free from the lien of an older judgment of a state court.

Statement of the Case.

Parker recovered a judgment for three hundred and eight dollars and thirty-four cents with interest, against Riddick & Stallings in the Superior Court of the State of North Carolina, for the county of Perquimans, on April 15, 1867.

On this judgment a *fi. fa.* was issued on August 27, 1867, which was levied on September 10, 1867, "on the farm whereon Riddick lives."

By this levy, under the laws of North Carolina, Parker acquired a lien on the lands so levied on.

No sale having been made on this execution, on October 24, 1867, a *venditioni exponas* was issued returnable to the spring term of 1868, of the Superior Court of Perquimans, but just about that time, the commanding officer of Military District Number Two, as North Carolina was then known to the Federal military authorities, issued an order known as Military

Statement of the Case.

Order No. 10, prohibiting sales on executions out of the courts of North Carolina, and staying proceedings for the collection of debts to the extent in said order set forth.

The sheriff of Perquimans accordingly returned his writ as stayed by Military Order No. 10.

After this judgment, levy, and issue of the *venditioni exponas*, Whitely, Stone & Co. recovered judgment at the November Term of the court against Riddick for the sum of nine hundred and sixteen dollars and twenty-nine cents, interest and costs. On this judgment a *fi. fa.* was issued and levied January 13, 1868, on the same tract covered by Parker's levy of September 10, 1867. Under the levy the land was sold, and bought by the plaintiffs.

On the return of the writ to this court with the proceeds of sale, Parker appeared and moved the court to order the money in the hands of the marshal realized under Whitely, Stone & Co.'s execution, to be paid over to him, because, as he contended, he had the prior lien, which he was prevented from asserting by the military authority of the United States, while the plaintiffs were allowed to go on and sell the property under their junior lien.

W. H. N. Smith, for Parker.

In *Harbin v. Carson* (4 *Dev. & Bat.* 388), it is held that after a sale under a *fi. facias*, the land may be sold under a *venditioni exponas* issuing upon an attachment, the lien whereof overreached that of the *fi. fa.*, and the purchasers at the last sale acquired title. This, however, is overruled, and the contrary declared in *McMillars v. Parsons* (7 *Jo.* 163). The contest must be as to the disposition of the money, as the first sale transfers the title.

In case of several executions from different courts,

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and a sale under a junior execution, the title passes, and the plaintiff in the senior execution must look to the proceeds of sale, by a rule for their application to his debt (Jones v. Judkins, 4 D. & B. 454).

Rogers & Bachelor, for Whitely, Stone & Co.

CHASE, Ch. J.—This is a motion to appropriate money made by the sale of land under an execution issued from this court, to the satisfaction of a judgment rendered in a state court, and having a prior lien upon the land.

Whitely, Stone & Co. recovered a judgment at the November Term, 1867, of the Circuit Court for the District of North Carolina, for nine hundred and sixteen dollars and twenty-nine cents, with three hundred and thirty-six dollars and nine cents damages, and forty-three dollars and ninety-nine cents costs, with interest from November 25, 1867.

Upon this judgment a *fi. fa.* was issued, returnable June 7, 1868; which was returned with the following endorsements, made by the deputy of the marshal:

“Levied on one hundred acres of land, more or less, adjoining the land of F. H. Russell and Solomon Eason, and lying on Perquimans River Swamp, it being the home tract of said Riddick, one hundred and fifty acres woodland, more or less, lying on the Dismal Swamp, January 13, 1868.”

The first-mentioned tract of land, in the said levy, was bid off by J. W. Albertson, attorney for Whitely, Stone & Co. for four hundred and forty-five dollars; the second by the same for fifty dollars, making in the whole four hundred and ninety-five dollars.

The levy also embraced some chattel property returned not sold for want of bidders.

Prior to this proceeding, at the spring term of the Superior Court of the state of North Carolina, for

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Perquimans County, James H. Parker had recovered a judgment against Willis D. Riddick and James W. Stallings for three hundred and eight dollars and thirty-four cents, with interest from January 29, 1861, and four per cent. additional interest on the principal, from August 10, 1861, to April 15, 1867 (the date of the judgment), and costs.

On this judgment a *fi. fa.* was issued on August 27, and was levied September 10, 1867, "on the farm whereon W. D. Riddick lives, adjoining lands of E. N. Riddick, and also the store of W. D. Riddick."

No sale was made under this execution, and on October 24, 1867, a *venditioni exponas* was issued, returnable at the Spring Term of 1868 of the Superior Court, and was returned "no sale on account of Military Order No. 10."

It is agreed that the land levied upon under this judgment was the home tract levied upon under the judgment of this court. Upon this statement, it is clear that the Parker judgment is the older and better lien upon the land.

The only question is whether in this court, upon motion, an order can be made appropriating the proceeds of sale under the junior judgment to the satisfaction of the elder lien.

• It is not doubted that, if both judgments had been rendered in the same court, the order suggested might be made.

The court, having control of its own process, might make the necessary order distributing the money, and protecting the rights of all parties by the requisite entries.

But we do not see how this can be done in a court of the United States on a motion for appropriation to a judgment of a state court.

It is suggested that the order for the appropriation

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asked for might be made conditionally upon the production of evidence of satisfaction of the judgment in the state court. But it is obvious that satisfaction in the state court must depend upon the action of that court. In the particular case before us, no difficulty might arise or harm ensue. But the principle, if adopted and acted upon, of determining upon motion in a National Court upon rights acquired in a state court, could hardly fail of embarrassing results in practice.

It is enough for the present case that there seems to be no recognized rule of law which requires one court to give effect, in this way, to the judgments and decrees of another; and that no case is produced in support of the motion addressed to us.

It is argued only that the sale, on the Circuit Court judgment, will carry the title, and so defeat the lien of the state court judgment by taking from under it the land on which it operates.

The case of *McMillan v. Parsons* (7 *Jones' Law Reports*, 166), is cited in support of this view. The most that can be said of that case is, that the learned Chief Justice questioned a judgment of the Supreme Court of North Carolina, asserting the opposite doctrine that a purchaser under a junior took subject to the superior lien of an elder judgment. We understand that the doctrine, stated by the Chief Justice, that a title to land unaffected by the older lien can be made by sale under the junior judgment, is now the recognized law and practice of this state. But we do not understand that this doctrine has ever been applied to a sale under an execution from a court of the United States. We can perceive reason for its application to sales under judgments of the same court, and, perhaps, of different courts of the same state, when an elder judgment creditor lies by, and permits a sale under the junior judgment and distribution of the proceeds. But these

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reasons do not seem to us applicable to judgments of courts of different sovereignties.

If the land could not be sold under the Parker judgment, and a good title made to the purchaser, a court of equity would doubtless interpose; and, all parties being before it, would marshal the liens, and distribute the proceeds of the sale made, if uncontested, according to priorities; but it seems to us, that the remedy of the plaintiff in the motion is complete at law. He has a judgment and levy, and the elder lien; and has nothing to do but to issue his *vendi.*, and sell the land.

The motion must be overruled.

Statement of the Case.

DISTRICT OF NORTH CAROLINA.

THE CROATAN.

A steamer being in custody of the marshal in a proceeding in admiralty, a state court has no jurisdiction to take it on attachment; therefore a judgment in such attachment creates no lien upon the steamer.

Such a proceeding in attachment was, in substance and in fact, a proceeding in admiralty, and beyond the jurisdiction of the state court. Instead of suing out an attachment in the state court, the creditor should have intervened for his interest in the U. S. District Court.

Statement of the Case.

This was an appeal from decrees in admiralty by the District Court for the Cape Fear district of North Carolina. It appears that Braham and others filed a libel in the District Court against the steamer Croatan, her tackle, apparel, and furniture, and that shortly afterwards Cassiday and Beery filed another libel in the same court against her and her appurtenances also.

She was accordingly taken possession of by the marshal.

While she was so in his possession, Levy sued out an attachment from the state court, and levied it on the steamer in the custody of the law, and in due time procured his judgment on attachment for three hundred and thirty-four dollars and seventy-six cents. After this levy of Levy's attachment, Dewey, on July 18, 1866, filed his libel on the vessel in the District Court for the sum of one thousand five hundred and eighty-four dollars and twenty-nine cents, and on July 23, 1866, Styles & Carter also filed their libel against

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her in the same court for the sum of one thousand three hundred and fifteen dollars and twenty-eight cents.

Matters were in this position when the District Court on August 2, 1866, decreed in favor of Braham, the first libellant, and Cassiday and Beery, the second libellants, and ordered the vessel to be sold to satisfy their claims.

She was accordingly sold on August 20, 1866, for ten thousand three hundred dollars, a sum much more than necessary to satisfy the two libels on account of which she was sold.

On October 30, 1866, a decree was pronounced in favor of Dewey for one thousand five hundred and eighty-four dollars and twenty-nine cents, and Styles & Carter for one thousand three hundred and fifteen dollars and twenty-eight cents, and their respective costs.

The claims of the first libellants having been paid, Levy filed his petition in this court, claiming the next lien on the surplus of the proceeds of the sale of the Croatan, by virtue of his attachment from the state court, which was levied next after the first two libels.

Dewey and Styles & Carter also filed their petitions claiming the surplus under their libels in the order of filing them, the surplus not being sufficient to pay both of them.

The court decided that Levy had obtained the prior lien by virtue of his attachment, and accordingly decreed in his favor to the amount of his claim, which it ordered to be paid out of the surplus in the registry of the court.

CHASE, Ch. J.—This is a petition for the appropriation of a sufficient amount of the proceeds of the steamer Croatan, sold under the order of the District Court, to the satisfaction of a judgment in attachment recovered by the petitioner, in one of the state courts

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of North Carolina. The petition alleged that sometime prior to the issuing of the attachment from the state court, a libel was filed in the District Court by Thomas A. Braham and others, against the steamer. And that another libel was filed by James Cassidy and Benjamin A. Beery, against the same steamer; and that such proceedings were had in Admiralty, that on August 2, 1866, the steamer, with her tackle, apparel, and furniture, were ordered to be sold. It further alleged that the steamer was sold on August 20, for ten thousand three hundred dollars, which was much more than sufficient to pay the amounts claimed in the two libels. The petitioner, therefore, prayed that a sufficient sum be appropriated out of the surplus and remnants to the satisfaction of his attachment. A decree was accordingly made by the District Court, directing the satisfaction of the claim of Levy by the payment to him of three hundred and thirty-four dollars and seventy-six cents, with his costs, out of the surplus and remnants.

It further appears that on July 18, 1866, William H. Denny filed his libel in the District Court for the district of Cape Fear against the steamer Croatan, alleging that in the month of March, 1866, the steamer being in the port of Charleston, S. C., the libellant furnished materials and labor towards equipping and finishing the steamer to the amount of one thousand five hundred and eighty-four dollars and twenty-nine cents.

At the hearing of this libel on October 30, 1866, a decree was made against the steamer, in favor of the libellant, for the sum of one thousand five hundred and eighty-four dollars and twenty-nine cents, and for his costs.

It further appears that on July 23, 1866, L. C. Styles and J. F. Carter, partners under the name of Styles & Carter, filed their libel in the District Court for the Cape Fear district of North Carolina, setting

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up a claim against the steamer Croatan for advances to pay the expense of necessary repairs and supplies, and praying a decree for the amount advanced, and for the sale of the steamer in order to the satisfaction of the same. Upon the hearing of this petition on October 30, 1866, a decree was made against the steamer, in favor of the libellants for the sum of one thousand three hundred and fifteen dollars and twenty-eight cents, and for their costs.

Subsequently, and while the petition of Jonas P. Levy for the application of the surplus to the satisfaction of his judgment in attachment, was pending in the District Court, William H. Denny and Styles & Carter filed their petition by way of intervention in the District Court, setting up the decrees in admiralty recovered by them respectively, and asking the appropriation of the remnants and surplus in the registry of the court to the satisfaction of their several decrees. This petition alleged that the proceeding of Levy by writ of attachment from the state court, created no lien upon the steamer, and insisted that he was not entitled to payment out of the remnants and surplus, which were insufficient to satisfy the claims of the petitioners.

Notwithstanding this petition of intervention, a decree was made, as has been already stated, in favor of Levy for the satisfaction of his judgment in attachment, and from this decree, the petitioners William H. Denny and Styles & Carter have appealed to this court.

The proceedings in this case have been quite loose and irregular. The petition of intervention bears no date, nor is there anything which indicates that it was ever filed in the District Court. No records of the proceedings of the District Court in the original libel suits of Thomas A. Braham, James Cassidy, and Benjamin A. Beery, have been brought into this court. There is nothing before me which shows the amount of the decrees in favor of

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the libellants in these suits. There is nothing, indeed, which gives any information respecting them, except the loose reference in the petition of Levy. There is no record of the petition of Levy for payment out of the remnants and surplus ; or of the petition of William H. Denny and Styles & Carter. The original papers only have been brought into this court. It is difficult, under such circumstances, to dispose of the case satisfactorily. There seems, however, to be no question that payment of the sum recovered in attachment was decreed as claimed, and that the decrees upon the libels of William H. Denny and Styles & Carter were rendered as stated. Nor is there any question that a surplus from the sale, under the original decrees, remained in the registry of the court, or that this surplus is insufficient to satisfy the decree, in favor of William H. Denny and Styles & Carter.

The real question is whether Jonas P. Levy was entitled to be paid the amount of his judgment in attachment, in preference to William H. Denny and Styles & Carter. I think he was not so entitled, for two reasons ; in the first place, the steamer, at the time this attachment was issued, was in custody of the marshal of the United States, and could not be taken upon an attachment issued out of a state court ; secondly, the proceeding in attachment was, in substance and fact, a proceeding in admiralty, and beyond the jurisdiction of a state court. Instead of suing out an attachment in the state court, Levy should have intervened for his interest in the District Court. The decree of the District Court, giving effect to the alleged lien of Levy under his attachment, was erroneous, and must be reversed.

A decree of reversal will be made accordingly, and the cause will be sent back to the District Court for further proceedings in conformity with this opinion.

Statement of the Case.

DISTRICT OF VIRGINIA.

November Term, 1869.

EVANS v. CITY OF RICHMOND.

No city within the Commonwealth of Virginia has power and authority to issue notes for circulation as money, of any denomination whatever.

The insurgent government of Virginia during the war was a *de facto* government.

As to regulations concerning marriage descents, conveyances of property, every thing, in short, which belongs to ordinary business, and the common transactions of life, its acts may be upheld as valid.

But, on the other hand, those acts of any body corporate, or otherwise, which were intended to subvert the authority of the United States, can not be so upheld.

Query, Can the legislature of the insurgent government be recognized by the government as valid ?

Query, Could that legislature authorize cities to issue notes for circulation as currency ?

The insurgent government of Virginia, especially, must be denied any larger recognition than is authorized by the case of *Texas v. Chiles*, since there existed at this very time another government within the limits recognized by the government of the United States as the true and lawful government of the state.

The city of Richmond issued certain notes in 1861, and others in 1862. The first were issued without authority of law. Subsequently an act of assembly undertook to legalize the former, and to authorize the latter. The court being satisfied from the evidence that they were issued to give aid and support to the war against the United States, they are void.

Statement of the Case.

This was a suit brought by the plaintiffs, citizens of

Statement of the Case.

Maryland, against the city of Richmond to recover the amount of certain small notes (notes under the denomination of five dollars), issued by the city during the year 1861, and after April 19, of that year.

It was submitted to the court without a jury.

On the trial it appeared that by the laws of Virginia in force before the war, the issue of notes of circulation under the denomination of five dollars was absolutely prohibited to all municipal corporations and other persons.

But the banks of Virginia suspended specie payments early in 1861, before the beginning of the war, and the scarcity of change was an inconvenience seriously felt in the whole community.

The city of Richmond, immediately on the secession of Virginia, voted large supplies to the volunteer troops raised by her, and to a large extent equipped and clothed them by her credit and means. While she was doing this, her authorities issued, by virtue of ordinances of the city government, small notes to an amount of about three hundred thousand dollars. It was in evidence that these notes were paid out in change, and exchanged with the banks for their issues, which, with the city notes, were used indiscriminately in paying the expenses of the city, its salaries, disbursements for troops and pay of its employes, as well as interest on its debts created long before the war.

In 1862, the city presented a memorial to the legislature of Virginia, stating that it had thus issued these notes in violation of law; that they had been issued under urgent necessity, to be used as small change by the community, then totally without it, because of the disappearance of gold and silver from circulation, and because it was necessary to purchase supplies for the volunteers from Richmond in the Confederate army, and praying the passage of an act legalizing this

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action, and authorizing further issues. Such an act was accordingly passed.

The city notes circulated as currency, and were recognized as legal and binding on the city until the overthrow of the *de facto* government of Virginia in April, 1865, and the establishment of the Alexandria Government over the whole territory. After that period the city authorities, the mayor, common council, and other officers, were appointed by the military authority governing Virginia, and these authorities refused to recognize these issues as binding on the city. Wherefore this suit was brought.

J. A. Jones and W. T. Joynes, for plaintiffs.

R. T. Daniel and Steger, for defendants.

CHASE, CH. J.—We have not been able to give to this case so full and thorough an examination as we should desire to give it, but it is not probable that our opinion will undergo any change, so we shall proceed to state it briefly.

This is a suit against the city of Richmond upon small notes issued under the orders of the council. These notes were issued in 1861. At that time they were, in the judgment of the court, void notes.

We are not able to agree with the counsel who think that, upon a fair construction of the statutes of Virginia, any city within the Commonwealth could issue, for circulation as money, notes of any denomination whatever. To hold that, would be, it seems to us, to disregard the whole policy of the state with regard to the issue of unauthorized paper. It would require very strong argument to convince us that any city could issue paper for circulation, in the similitude of bank notes, in contravention of the positive enactments, and of the general policy of the state.

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These notes, then, as we think, were void at the time they were issued.

Subsequently, and during the war, the legislature of the insurgent state of Virginia, having control of much the larger portion of the territory, passed an act authorizing the issue of these or similar notes. Whether this action can be regarded as valid, having been taken by the legislature of the state under such circumstances that it could not be recognized by the government of the United States as a lawful government; whether, indeed, this legislature itself can be regarded as valid, admits of very serious question.

In the case of *Texas v. Chiles*, the Supreme Court held that the acts of a body exercising authority in an insurgent state as a legislature must be regarded by the United States as either valid or not, according to the subject-matter of legislation.

That the governor, legislature, and judges of Virginia during the war constituted a *de facto* government, nobody will question. They exercised complete control over the greater part of the state, proceeding in all the forms of regular organized government, and occupying the capital of the state.

It was a *de facto* government. But then it was a government at war with the United States, and in rebellion against its constitutional authority, and could not be recognized in the national courts as the lawful government; nor could its acts be recognized as lawful acts, so far as these acts had the effect, or were intended to have the effect, of overcoming the authority of the United States within the limits of Virginia, or of excluding that authority from those limits.

As to regulations concerning marriage descents, conveyance of property, everything, in short, which belongs to ordinary business and the common transactions of life, its acts may be upheld as valid. But, on the other hand, those acts of any body, corporate

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or otherwise, which were intended to subvert the authority of the United States, can not be so upheld.

This is the distinction laid down by the Supreme Court in the case of *Texas v. Chiles*, and if we were disposed to depart from it, we should not be at liberty to do so.

The insurgent government of Virginia especially, must be denied any larger recognition, since there existed at this very time another government within its limits, recognized by the government of the United States as the true and lawful government of the state.

If there had been no rebellion, and Virginia had seen fit to change her policy with respect to the issue of small notes, as, for example, if there had been a general suspension of specie payments, and the state, not choosing to relieve the banks from incapacity to issue small notes, had preferred to give that authority to municipal corporations, the right of the state so to act could not be questioned. There would be no doubt on that point; and if, before the adoption of this policy, any particular municipality, as, in this instance, the city of Richmond, had illegally issued notes of this character, it seems impossible to deny that subsequent legislation giving to the city the same authority to issue small notes, which was actually conferred in 1862, must have been held as legalizing the whole issue. Certainly, as it seems to us, suits upon notes of the earlier issues might be maintained against the city with the same legal results as upon those of the later emission. There could be no policy which would invalidate the first notes more than the last. So that if there were no questions in this case other than those arising upon the acts of the legislature and internal state policy, it would be very difficult to avoid the conclusion that the city of Richmond is liable for these notes, and must provide for the payment of them equally with the notes subsequently issued.

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The acts of 1862 were intended, as we think, to sanction all the small notes of the cities, within the limits defined by them, without regard to the time of emission.

But all this does not touch the controlling question in this case. That question is: For what purpose were these notes issued? Were they or were they not issued for the purpose of aiding the rebellion against the government of the United States?

The circumstances under which they were put into circulation have been fully detailed by the witnesses. There was a suspension of specie payments, and doubtless one of the objects of the emission was to provide a convenient and safe circulation of notes under five dollars, and for parts of a dollar. And this certainly might be legalized. But another, and as the evidence shows, a very leading object, was to give aid and support to the rebellion.

The memorial of the city council of Richmond to the legislature excludes all doubt on this point. The case is brought, therefore, directly within the principles of the decision in the case of *Texas v. Chiles*, and the court is obliged to hold that no recovery can be had upon the notes.

Judgment may be entered for the defendant.

APPENDIX.

THE CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA.

We, the people of the Confederate States, each state acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish this constitution for the Confederate States of America.

ARTICLE I.

SECTION 1.

All legislative powers herein delegated shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives.

SECTION 2.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several states ; and the electors in each state shall be citizens of the Confederate States, and have the qualifications requisite for electors of the most numerous branch of the State Legislature, but no person of foreign birth, not a citizen of the Confederate States, shall be allowed to vote for any officer, civil or political, State or Federal.

2. No person shall be a Representative who shall not have attained the age of twenty-five years, and be a citizen of the Confederate States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within the Confederacy, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all slaves. The actual enumeration shall be made within three years after the first meeting of the Congress of the Confederate States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every fifty thousand, but each state shall have at least one Representative, and until such enumeration shall be made, the state of South Carolina shall be entitled to choose six ; the state of Georgia, ten ; the state of Alabama, nine ; the state of Florida, two ; the state of Mississippi seven ; the state of Louisiana, six ; and the state of Texas, six.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose the speaker and other officers, and shall have the sole power of impeachment ; except that any judicial or other federal officer, resident and acting solely within the limits of any state, may be impeached by a vote of two-thirds of both branches of the legislature thereof.

SECTION 3.

The Senate of the Confederate States shall be composed of two senators from each state, chosen for six years by the Legislature thereof, at the regular session next immediately preceding the commencement of the

term of service, and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, and of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one third may be chosen every second year: and if vacancies happen by resignation or otherwise, during the recess of the legislature of any state, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained the age of thirty years, and be a citizen of the Confederate States, and who shall not, when elected, be an inhabitant of the state for which he shall be chosen.

4. The Vice-President of the Confederate States shall be President of the Senate, but shall have no vote unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the Confederate States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be, on oath or affirmation. When the President of the Confederate States is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit, under the Confederate States, but the party convicted shall nevertheless be liable and subject to

indictment, trial, judgment and punishment according to law.

SECTION 4.

1. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof, subject to the provisions of this constitution ; but the Congress may at any time, by law, make or alter such regulations, except as to the times and places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.

SECTION 5.

1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business ; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such a manner and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds of the whole number expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy ; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the latter, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6.

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by

law, and paid out of the treasury of the Confederate States. They shall in all cases, except treason, felony, and breach of peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same ; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the Confederate States, which shall have been created, or the emoluments whereof shall have been increased during such time ; and no person holding any office under the Confederate States shall be a member of either House during his continuance in office. But Congress may, by law, grant to the principal officer in each of the Executive Departments, a seat upon the floor of either House, with the privilege of discussing any measures appertaining to his department.

SECTION 7.

1. All bills for raising revenue shall originate in the House of Representatives ; but the Senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed both Houses, shall, before it becomes a law, be presented to the President of the Confederate States ; if he approve, he shall sign it ; but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill be entered on the journal of each

House respectively. If any shall not be returned to the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return; in which case it shall not be a law. The President may approve any appropriation, and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved, and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated, and the same proceedings shall then be had as in case of other bills disapproved by the President.

3. Every order, resolution, or vote, to which the concurrence of both Houses may be necessary (except on a question of adjournment), shall be presented to the President of the Confederate States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by both Houses according to the rules and limitations prescribed in case of a bill.

SECTION 8.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises for revenue necessary to pay the debts, provide for the common defense, and carry on the government of the Confederate States; but no bounties shall be granted from the treasury; nor shall any duties or taxes on importation from foreign nations be laid to promote or foster any branch of industry, and all duties, imposts, and excises, shall be uniform throughout the Confederate States.

2. To borrow money on the credit of the Confederate States.

3. To regulate commerce with foreign nations and the several states, and with the Indian tribes, but neither this nor any other clause contained in the Consti-

tution, shall ever be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation, in all which cases such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof.

4. To establish uniform laws of naturalization and uniform laws on the subject of bankruptcies throughout the Confederate States, but no law of Congress shall discharge any debt contracted before the passage of the same.

5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the Confederate States.

7. To establish post-offices and post routes, but the expenses of the Post-Office Department after the first day of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues.

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish piracies and felonies committed on the high seas and offenses against the law of nations.

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions.

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the Confederate States; reserving to the states, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may by cession of one or more states, and the acceptance of Congress, become the seat of the government of the Confederate States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; and,

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the Confederate States, or in any department or officer thereof.

• SECTION 9.

1. The importation of negroes of the African race, from any foreign country other than the slaveholding states or territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same.

2. Congress shall also have power to prohibit the introduction of slaves from any state not a member of, or territory not belonging to, this confederacy.

3. The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.

4. No bill of attainder, *ex post facto* law, or law denying or impa[i]ring the right of property in negro slaves shall be passed.

5. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

6. No tax or duty shall be laid on articles exported from any state, except by a vote of two-thirds of both Houses.

7. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another.

8. No money shall be drawn from the treasury, but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

9. Congress shall appropriate no money from the treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of the departments, and submitted to Congress by the President, or for the purpose of paying its own expenses and contingencies ; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the government, which is hereby made the duty of Congress to establish.

10. All bills appropriating money shall specify in Federal currency the exact amount of each appropriation, and the purposes for which it is made ; and Congress shall grant no extra compensation to any public contractor, officer, agent, or servant, after such contract shall have been made, or such service rendered.

11. No title of nobility shall be granted by the Confederate States, and no person holding any office of profit or trust under them shall, without the consent

of Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

12. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and petition the government for a redress of grievances.

13. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

14. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

15. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

16. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

17. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact so tried by a jury shall be otherwise re-examined in any court of the Confederacy than according to the rules of common law.

19. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unjust punishment inflicted.

20. Every law or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.

SECTION 10.

1. No state shall enter into any treaty, alliance, or confederation, grant letters of marque or reprisal, coin money, make anything but gold and silver coins a tender in payment of debts; pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the Confederate States, and all such laws shall be subject to the revision and control of Congress.

3. No state shall, without the consent of Congress, lay any duty on tonnage, except on sea-going vessels, for the improvement of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States with foreign nations; and surplus revenue thus derived shall, after making such improvement, be paid into the common

treasury. Nor shall any state keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay. But when any river divides or flows through two or more states, they may enter into compacts with each other to improve the navigation thereof.

ARTICLE II.

SECTION 1.

1. The executive power shall be vested in a President of the Confederate States of America. He and the Vice-President shall hold their offices for the term of six years, but the President shall not be re-eligible. The President and Vice-President shall be elected as follows :

2. Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in Congress, but no Senator or Representative, or person holding an office of trust or profit under the Confederate States shall be appointed an elector.

3. The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves ; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify and transmit sealed to the seat of the government of the Confederate States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and

the votes shall then be counted ; the person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed, and if no person have such majority, then from the persons having the highest numbers not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representative from each State having one vote ; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of death or other constitutional disability of the President.

4. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed ; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President ; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

5. But no person constitutionally inelegible to the office of President shall be eligible to that of Vice-President of the Confederate States.

6. The Congress may determine the time of choosing electors, and the day on which they shall give their votes ; which day shall be the same throughout the Confederates States.

7. No person except a natural-born citizen of the Confederate States or a citizen thereof at the time of the adoption of this Constitution, or a citizen thereof born

in the United States prior to December 20, 1860, shall be eligible to the office of President ; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the limits of the Confederate States as they may exist at the time of his election.

8. In case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may, by law, provide for the case of removal, death, resignation or inability both of the President and Vice-President, declaring what officer shall then act as President ; and such officer shall act accordingly, until the disability be removed or President shall be elected.

9. The President shall, at stated times, receive for his services a compensation, which shall be neither increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the Confederate States or any of them.

10. Before he enters on the execution of his office he shall take the following oath or affirmation :

“I do solemnly swear (or affirm) that I will faithfully execute the office of President of the Confederate States, and will, to the best of my ability, preserve, protect and defend the Constitution thereof.”

SECTION 2.

1. The President shall be commander-in-chief of the army and navy of the Confederate States ; he may require the opinion, in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective officers ; and he shall have power to grant reprieves and pardons for offenses against the Confederate States except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties ; provided two

thirds of the Senators present concur ; and he shall nominate, and by and with the consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the Confederate States whose appointment are not herein otherwise provided for, and which shall be established by law, but the Congress may by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The principal officer in each of the executive departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the executive departments may be removed at any time by the President, or other appointing power, when their services are unnecessary or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty, and when so removed, the removal shall be reported to the Senate, together with the reasons therefor.

4. The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session ; but no person rejected by the Senate shall be re-appointed to the same offices during their ensuing recess.

SECTION 3.

1. The President shall from time to time give to the Congress information of the state of the Confederacy, and recommend to their consideration such measures as he shall judge necessary and expedient ; he may, on extraordinary occasions, convene both Houses on either of them ; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such a time as he shall think proper ; he will receive ambassadors and other public ministers ; he shall take care that the laws be faith-

fully executed, and shall commission all the officers of the Confederate States.

SECTION 4.

1. The President, Vice-President, and all civil officers of the Confederate States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1.

1. The judicial power of the Confederate States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2.

1. The judicial power shall extend to all cases arising under this Constitution, the laws of the Confederate States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers and consuls ; to all cases of admiralty and maritime jurisdiction, to controversies to which the Confederate States shall be a party ; to controversies between two or more states ; between a state and citizens of another state, where the state is plaintiff ; between citizens claiming lands under grants of different states, and between a state or citizens thereof and foreign states, citizens or subjects ; but no state shall be sued by a citizen or subject of any foreign state.

2. In all cases affecting ambassadors or other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both

as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed ; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3.

1. Treason against the Confederate States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason ; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof.

SECTION 2.

1. The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states ; and shall have the right of transit and sojourn in any state of this Confederacy with their slaves and other property ; and the right of property in said slaves shall not be thereby impaired.

2. A person charged in any state with treason, felony, or other crime against the laws of such state, who shall flee from justice, and be bound in another state, shall on demand of the executive authority of the

state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No slave or the person held to service or labor in any State or Territory of the Confederate States, under the laws thereof, escaping or lawfully carried into another, shall in consequence of any law or regulation therein, be discharged from such service or labor ; but shall be delivered up on claim of the party to whom such slave belongs, or to whom such labor or service may be due.

SECTION 3.

1. Other states may be admitted into this Confederacy by a vote of two-thirds of the Senate, the Senate voting by States ; but no new state shall be formed or erected within the jurisdiction of any other state ; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations concerning the property of the Confederate States including the lands thereof.

3. The Confederate States may acquire new territory ; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits or the several states ; and may permit them, at such times and in such manner as it may by law provide, to form states to be admitted into the Confederacy. In all such territory, the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress and by the territorial government ; and the inhabitants of the several Confederate States and Territories shall have the right to take to such territory any slaves lawfully held by them in any of the States or Territories of the Confederate States.

4. The Confederate States shall guarantee to every state that now is, or hereafter may become a member of this Confederacy, a republican form of government, and shall protect each of them against invasion; and on application of the legislature (or of the executive, when the legislature is not in session) against domestic violence.

ARTICLE V.

SECTION 1.

1. Upon the demand of any three states, legally assembled in their several conventions, the Congress shall summon a convention of all the states, to take into consideration such amendments to the Constitution as the said states shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the Constitution be agreed on by the said convention—voting by states—and the same be ratified by the legislatures of two-thirds of the several states or by conventions in two-thirds thereof,—as the one or the other mode of ratification may be proposed by the general convention,—they shall thence forward form a part of this Constitution. But no state shall, without its consent, be deprived of its equal representation in the Senate.

ARTICLE VI.

1. The Government established by this Constitution is the successor of the Provisional Government of the Confederate States of America, and all the laws passed by the latter shall continue in force until the same shall be repealed or modified; and all the officers appointed by the same shall remain in office until their successors are appointed and qualified or the offices abolished.

2. All debts contracted and engagements entered into before the adoption of this Constitution, shall be as valid against the Confederate States under this Constitution, as under the Provisional Government.

3. This Constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made, or which shall be made under the authority of the Confederate States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

4. The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers both of the Confederate States and of the several states, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the Confederate States.

5. The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several states.

6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people thereof.

ARTICLE VII.

1. The ratification of the conventions of five states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

2. When five states shall have ratified this Constitution, in the manner before specified, the Congress under the Provisional Constitution shall prescribe the time for holding the election of President and Vice-President, and for the meeting of the Electoral College, and for counting the votes, and inaugurating the President. They shall also prescribe the time for holding the first election of members of Congress under this Constitution, and the time for assembling the same. Until the assembling of such Congress, the Congress under the Provisional Constitution shall continue to

exercise the legislative powers granted them; not extending beyond the time limited by the Constitution of the Provisional Government.

Adopted unanimously by the Congress of the Confederate States of South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Texas, sitting in Convention at the capitol in the city of Montgomery, Alabama, on the eleventh day of March, in the year eighteen hundred and sixty-one.

HOWELL COBB,

President of the Congress.

South Carolina.—R. Barnwell Rhett, C. G. Memminger, Wm. Porcher Miles, James Chesnut, Jr., R. W. Barnwell, William W. Boyce, Lawrence M. Keitt, T. J. Withers.

Georgia.—Francis S. Bartow, Martin J. Crawford, Benjamin H. Hill, Thos. R. R. Cobb.

Alabama.—Richard W. Walker, Robt. H. Smith, Colin J. McRae, William P. Chilton, Stephen F. Hale, David P. Lewis, Tho. Fearn, Jno. Gill Shorter, J. L. M. Curry.

Florida.—Jackson Morton, J. Patton Anderson, Jas. B. Owens.

Mississippi.—Alex. M. Clayton, James T. Harrison, William S. Barry, W. S. Wilson, Walker Brooke, W. P. Harris, J. A. P. Campbell.

Louisiana.—Alex de Clonet, C. M. Conrad, Duncan F. Kenner, Henry Marshall.

Texas.—John Hemphill, Thomas W. Waul, Jno. H. Reagan, Williamson S. Aldham, Louis T. Wigfall, John Gregg, William Beck Ochiltree.

[Extract from the Journal of the Congress.]

Congress, March 11, 1861.

On the question of the adoption of the Constitution of the Confederate States of America, the vote was taken by yeas and nays; and the Constitution was unanimously adopted, as follows:

Those who voted in the affirmative being Messrs. Walker, Smith, Curry, Hale, McRae, Shorter, and Fearn of Alabama (Messrs. Chilton and Lewis being absent); Messrs. Morton, Anderson, and Owens of Florida; Messrs. Toombs, Howell Cobb, Bartow, Nisbet, Hill, Wright, Thomas R. R. Cobb, and Stevens, of Georgia (Messrs. Crawford and Kenan being absent); Messrs. Perkins, De Clouet, Coural, Kenner, Sparrow, and Marshall, of Louisiana; Messrs. Harris, Brooke, Wilson, Clayton, Barry, and Harrison, of Mississippi (Mr. Campbell being absent); Messrs. Rhett, Barnwell, Keitt, Chesnut, Memminger, Miles, Withers, and Boyce, of South Carolina; Messrs. Reagan, Hemphill, Waul, Gregg, Oldham, and Ochiltree, of Texas (Mr. Wigfall being absent).

A true copy.

J. J. HOOPER.

Secretary of the Congress.

Congress, March 11, 1861.

I do hereby certify that the foregoing are, respectively true and correct copies of "The Constitution of the Confederate States of America," unanimously adopted this day, and of the yeas and nays on the question of the adoption thereof.

HOWELL COBB,

President of the Congress.

THE CONSCRIPT ACT.

CHAP. XXXI.—An act to further provide for public defense.

In view of the exigencies of the country, and the absolute necessity of keeping in the service of a gallant army, and of placing in the field a large additional force to meet the advancing columns of the enemy now invading our soil : Therefore

The Congress of the Confederate States of America do enact, That the President be, and he is hereby authorized to call out and place in the military service of the Confederate States for three years, unless the war shall have been sooner ended, all white men who are residents of the Confederate States, between the ages of eighteen and thirty-five years at the time the call or calls may be made, who are not legally exempted from military service. All of the persons aforesaid who are now in the armies of the Confederacy, and whose term of service will expire before the war, shall be continued in the service for three years from the date of their original enlistment, unless the war shall have been sooner ended : Provided, however, That all such companies, squadrons, battalions, and regiments, whose term of original enlistment was for twelve months, shall have the right within forty days, on a day to be fixed by the commander of the brigade, to reorganize said companies, battalions, and regiments. by electing all their officers which they had a right heretofore to elect, who shall be commissioned by the President : Provided, further, That furloughs not exceeding sixty days, with transportation home and back, shall be granted to all those retained in the service by the provisions of an act entitled "An act providing for the granting of bounty and

furloughs to privates and non-commissioned officers in the provisional army," approved eleventh of December, eighteen hundred and sixty-one, said furloughs to be granted at such time, and in such numbers as the Secretary of War may deem most compatible with the public interest: and Provided, further, That in lieu of a furlough the commutation value in money of the transportation herein above granted, shall be paid each private, musician, or non-commissioned officer who may elect to receive it, at such time as the furlough would otherwise be granted: Provided, further, That all persons under the age of eighteen years or over the age of thirty-five years, who are now enrolled in the military service of the Confederate States, in the regiments, squadrons, battalions, and companies, hereafter to be reorganized, shall be required to remain in their respective companies, squadrons, battalions, and regiments, for ninety days, unless their place can be sooner supplied by other recruits not now in the service, who are between the ages of eighteen and thirty-five years, and all laws and parts of laws providing for the re-enlistment of volunteers, and the organization thereof into companies, squadrons, battalions, or regiments, shall be and the same are hereby repealed.

§ 2. Be it further enacted, That such companies, squadrons, battalions, or regiments organized or in process of organization by authority from the Secretary of War, as may be within thirty days from the passage of this act so far completed as to have the whole number of men requisite for an organization actually enrolled, not embracing in said organizations any persons now in service, shall be mustered into the service of the Confederate States, as part of the land forces of the same, to be received in that arm of the service in which they are authorized to organize, and shall elect their company, battalion, and regimental officers.

§ 3. Be it further enacted, That for the enrollment of all persons comprehended within the provisions of this act, who are not already in the service in the armies of the Confederate States, it shall be lawful for the President, with the consent of the governors of the respective states, to employ state officers, and on failure to obtain such consent, he shall employ Confederate officers, charged with the duty of making such enrollments in accordance with rules and regulations to be prescribed by him.

§ 4. Be it further enacted, That persons enrolled under the provisions of the proceeding section, shall be assigned by the Secretary of War to the different companies now in the service, until each company is filled to its maximum number, and the persons so enrolled shall be assigned to companies from the states from which they respectively come.

§ 5. Be it further enacted, That all seamen and ordinary seamen in the land forces of the Confederate States, enrolled under the provisions of this act, may, on application of the Secretary of the Navy, be transferred from the land to the naval service.

§ 6. Be it further enacted, That in all cases where a state may not have in the army a number of regiments, battalions, squadrons, or companies, sufficient to absorb the number of persons subject to military service under this act belonging to such state, then the residue of her excess thereof shall be kept as a reserve, under such regulations as may be established by the Secretary of War, and that at stated periods of not greater than three months, details determined by lot shall be made from said reserve, so that each company shall, as nearly as practicable, be kept full : Provided, That the persons held in reserve may remain at home until called into service by the President : Provided, also, That during their stay at home, they shall not receive pay : Provided, further, That the persons comprehended in this act, shall not be subject to the rules and

articles of war, until mustered into the actual service of the Confederate States: except that said persons, when enrolled and liable to duty, if they shall wilfully refuse to obey said call, each of them shall be held to be a deserter, and punished as such, under said articles: Provided, further, That whenever in the opinion of the President, the exigencies of the public service may require it, he shall be authorized to call into actual service the entire reserve, or so much as may be necessary, not previously assigned to different companies in service under provision of section four of this act, said reserve shall be organized under such rules as the Secretary of War may adopt: Provided, The company, battalion, and regimental officers shall be elected by the troops composing the same: Provided, The troops raised in any one state shall not be combined in regimental, battallion, squadron, or company organization with troops raised in any other state.

§ 7. Be it further enacted, That all soldiers now serving in the army or mustered in the military service of the Confederate States, or enrolled in said service under the authorization heretofore issued by the Secretary of War, and who are continued in the service by virtue of this act, who have not received the bounty of fifty dollars allowed by existing laws, shall be entitled to receive said bounty.

§ 8. Be it further enacted, That each man who may hereafter be mustered into service, and who shall arm himself with a musket, shot-gun, rifle, or carbine, accepted as an efficient weapon, shall be paid the value thereof, to be ascertained by the mustering officers under such regulations as may be prescribed by the Secretary of War, if he is willing to sell the same, and if he is not, then he shall be entitled to receive one dollar a month for the use of said received and approved musket, rifle, shot-gun, or carbine.

§ 9. Be it further enacted, That persons not liable for duty may be received as substitutes for those who

are under such regulations as may be prescribed by the Secretary of War.

§ 10. Be it further enacted, That all vacancies shall be filled by the President from the company, battalion, squadron, or regiment in which such vacancies shall occur, by promotion according to seniority, except in case of disability or other incompetency: Provided, however, That the President may, when in his opinion it may be proper, fill such vacancy or vacancies by the promotion of any officer or officers, or private or privates, from such company, battalion, squadron, or regiment who shall have been distinguished in the service by exhibition of valor and skill, and that whenever a vacancy shall occur in the lowest grade of the commissioned officers of a company, said vacancy shall be filled by election: Provided, That all appointments made by the President shall be by and with the advice and consent of the Senate.

§ 11. Be it further enacted, That the provisions of the first section of this act, relating to the election of officers, shall apply to those regiments, battalions, and squadrons, which are composed of twelve months' and war companies combined in the same organization, without regard to the manner in which the officers thereof were originally appointed.

§ 12. Be it further enacted, That each company of infantry, shall consist of one hundred and twenty-five rank and file; each company of field artillery of one hundred and fifty, rank and file; each of cavalry, of eight, rank and file.

§ 13. Be it further enacted, That all persons subject to enrollment, who are now in the service, under the provision of this act, shall be premitted previous to such enrollment to volunteer in companies now in the service.

Approved, April 16, 1862.

THE SEQUESTRATION ACT.

CHAP. LXI.--An Act for the sequestration of the estates, property, and effects of alien enemies, and for the indemnity of citizens of the Confederate States, and persons aiding the same in the existing war with the United States.

Whereas the government and people of the United States have departed from the usages of civilized warfare in confiscating and destroying the property of the people of the Confederate States of all kinds, whether used for military purposes or not, and whereas our only protection against such wrongs is to be found in such measures of retaliation as will ultimately indemnify our own citizens for their losses, and restrain the wanton excesses of our enemies: Therefore, Be it enacted by the Congress of the Confederate States of America, That all and every the lands, tenements, and hereditaments, goods and chattels, rights and credits within these Confederate States, and every right and interest therein held, owned, possessed, or enjoyed by or for the alien enemy since the twenty-first day of May, one thousand eight hundred and sixty-one, except such debts due to an alien enemy as may have been paid into the Treasury of any one of the Confederate States prior to the passage of this law, be and the same are hereby sequestered by the Confederate States of America, and shall be held for the full indemnity of any true and loyal citizen or resident of these Confederate States, or other persons aiding said Confederate States in the prosecution of the present war between said Confederate States and the United States of America, and for which he may suffer any loss or injury under the act of the United States to which this act is

retaliatory, or under any other act of the United States, or of any state thereof, authorizing the seizure, condemnation, or confiscation of the property of citizens, or residents of the Confederate States, or other person aiding said Confederate States, and the same shall be, and disposed of, as provided for in this act: Provided however, When the estate, property, or rights to be affected by this act, were or are within some State of this Confederacy, which has become such since said twenty-first day of May, then this act shall operate upon, and as to such estate, property, or rights, and all persons claiming the same, from and after the day such state so became a member of this Confederacy and not before: Provided further, That the provisions of this act shall not extend to the stocks or other public securities of the Confederate Government, or any of the states of this Confederacy, held or owned by any alien enemy, or to any debt, obligation, or sum due from the Confederate Government or any of the states to such alien enemy: And provided also, That the provisions of this act shall not embrace the property of citizens or residents of either of the States of Delaware, Maryland, Kentucky, or Missouri, or of the District of Columbia, or the Territories of New Mexico, Arizona, or the Indian Territory south of Kansas, except such of said citizens or residents as shall commit actual hostilities against the Confederate States, or aid and abet the United States in the existing war against the Confederate States.

§ 2. And be it further enacted, That it is, and shall be, the duty of each and every citizen of these Confederate States speedily to give information to the officers charged with the execution of this law of every and any lands, tenements, and hereditaments, goods and chattels, rights and credits within this Confederacy, and of every and interest therein held, owned, possessed, or enjoyed by or for any alien enemy as aforesaid.

§ 3. Be it further enacted, That it shall be the duty of every attorney, agent, former partner, trustee, or other person holding or controlling any such lands, tenements, or hereditaments, goods, or chattels, rights, or credits, or any interest therein of or for any such alien enemy, speedily to inform the receiver hereinafter provided to be appointed of the same, and to render an account thereof, and, so far as practicable, to place the same in the hands of such receiver; whereupon such persons shall be fully acquitted of all responsibility for property and effects so reported and turned over. And any such person wilfully failing to give such information, and render such account, shall be guilty of high misdemeanor, and upon indictment and conviction shall be fined in a sum not exceeding five thousand dollars, and imprisoned not longer than six months, said fine and imprisonment to be decided by the court trying the case, and shall further be liable to be sued by Confederate States, and subjected to pay double the value of the estate, property, or effects of the alien enemy held by him or subject to his control.

§ 4. It shall be the duty of the several judges of this Confederacy, to give this act specially in charge to the grand juries of these Confederate States, and it shall be their duty at each sitting well and truly to inquire, and report all lands, tenements, hereditaments, goods and chattels, rights and credits, and every interest therein within the jurisdiction of said grand jury held by or for any alien enemy, and it shall be the duty of the several receivers appointed under this act, to take a copy of such report, and proceed in obtaining the possession and control of all such property and effects reported, and to institute proceedings for the sequestration thereof in the manner hereinafter provided.

§ 5. Be it further enacted, That each judge of this Confederacy, shall as early as practicable, appoint a

receiver for each section of the state for which he holds account, and shall require him before entering upon the duties of his office to give a bond in such penalty as shall be prescribed by the judge, with good and sufficient security to be approved by the judge, conditioned that he will diligently and faithfully discharge the duties imposed upon him by law. And said officer shall hold this office at the pleasure of the judge of the district or section for which he is appointed, and shall be removed for incompetency or inefficiency, or infidelity in the discharge of his trust. And should the duties of any such receiver at any time appear to the judge to be inefficiently performed by them, it shall be the duty of the judge to divide the district or section into one or more receivers' districts, according to the necessities of the case, and to appoint a receiver for each of said newly created districts. And every such receiver shall also before entering upon the duties of his office, take oath in writing before the judge of the district or section for which he is appointed, diligently, well and truly to execute the duties of his office.

§ 6. Be it further enacted, That it shall be the duty of the several receivers aforesaid to take possession of all lands, tenements and hereditaments, goods and chattels, rights and credits of each and every alien enemy within the section for which he acts. And to this end he is empowered and required, whenever necessary for accomplishing the purpose of this act, to sue for and recover the same in the name of the Confederate States, allowing in the recovery of credits such delays as may have been or may be prescribed in any state as to the collection of debts thereon during the war. And the form and mode of action whether the matter be in jurisdiction of law or equity shall be by petition to the court, setting forth as best he can, the estate, property or right or thing sought to be recovered, with the name of the person holding, exercising supervision over, in possession of, or controlling the same, as the case may be, and pray-

ing a sequestration thereof. Notice shall thereupon be forthwith issued by the clerk of the court or by the receiver to such person with a copy of the petition, and the same shall be served by the marshal or his deputy, and returned to court as other mesne process in law cases, whereupon the cause shall be docketed and stand for trial in the court according to its usual course of business, and the court or judge shall at any time make all orders of seizure that may seem necessary to secure the sub-matter of the suit from danger of loss, injury, destruction or waste and may, pending the cause, make orders for sale in cases that may seem to such judge or court necessary to preserve any property sued for from perishing or waste: Provided, That in any case where the Confederate judge shall find it to be consistent with the safe-keeping of the property so sequestered to leave the same in the hands and under the control of any debtor or person in whose hands the real-estate and slaves were seized, who may be in possession of said property or credits, he shall order the same to remain in the hands and under the control of said debtor or person in whose hands the said real estate and slaves were seized requiring in every such case that such security for the safe-keeping of the property or credits as he may deem sufficient for the purpose aforesaid, and to abide by such further orders as the court may make in the premises.

But this proviso shall not apply to bank or other corporation, stock or dividends due, or which may be due thereon, or to rents or real estates in cities. And no debtor or other person shall be entitled to the benefit of this proviso, unless he has first placed into the hands of the receiver all the interests or net profits which may have accrued since the twenty-first of May, eighteen hundred and sixty-one; and in all cases coming under this proviso, such debtor shall be bound to pay over annually to the receiver all interest which may accrue as the same falls due, and the person in whose

hands any other property may be left shall be bound to account for and pay over annually to the receiver the net income or profits of its said property, and on failure of such debtor or person to pay over such interests, income, or profits which fall due, the receiver may demand and recover the said debt or property.

And whenever after ten days' notice to any debtor or person in whose hands property or debts may be left of an application for further security, it shall be made to appear to the satisfaction of the court that the securities of such debtor or person are not ample, the court may, on the failure of the party to give sufficient additional security, render judgment against all the parties on the bond for the recovery of the debt or property: Provided further, That said court may, whenever in the opinion of the judge thereof, the public exigencies may require it, order the money due as aforesaid to be demanded by the receiver, and if upon demand of the receiver made in conformity to a decretal order of the court requiring said receiver to collect any debts for the payment of which security may have been given under the provisions of this act, the debtor or his security shall fail to pay the same, then upon ten days' notice to said debtor and his security given by said receiver of a motion to be made in said court, for judgment for the amount so secured, said court at the next term thereof, may proceed to render judgment against said principal and security, or against the party served with such notice, for the sum so secured, with interest thereon, in the name of said receiver, and to issue execution therefor.

§ 7. Any person in the possession and control of the subject-matter of any such suit, or claiming any interest therein, may by order of the court be admitted as a defendant, and be allowed to defend to the extent of the interest propounded by him; but no person shall be heard in defense until he shall file a plea verified by affidavit and signed by him, setting forth that no alien

enemy has any interest in the right which he asserts, or for which he litigates either directly or indirectly by trust, open or secret, and that he litigates solely for himself, or for some citizen of the Confederate States, whom he legally represents; and when the defense is conducted for an account of another in whole or part, the plea shall set forth the name and residence of such other person, and the relation that the defendant bears to him in the litigation. If the cause involves matters which should be tried by a jury according to the course of the common law, the defendant shall be entitled to a jury trial. If it involves matters of equity jurisdiction, the court shall proceed according to its usual mode of procedure in such cases, and the several courts of the Confederacy may from time to time, establish rules of procedure under this act, not inconsistent with the act or other laws of these Confederate States.

§ 8. Be it further enacted, That the clerk of the court, shall at the request of the receiver, from time to time issue writs of garnishment directed to one or more persons, commanding them to appear at the then sitting, or at any future term of the court, and to answer under oath what property or effects of any alien enemy he had at the service of the process, or since has had under his possession or control, belonging to or held for any alien enemy, or in what sum, if any, he is or was at the time of service of the garnishment, or since, has been indebted to any alien enemy, and the court shall have the power to condemn the property or effects or debts according to the answer, and to make such rules and orders for the bringing in of third persons claiming or disclosed by the answer to have an interest in the litigation as it shall seem proper; but in no case shall any one be heard in respect thereto, until he shall by sworn plea set forth substantially the matters before required of parties pleading. And the decree or judgment of the court rendered in conformity with this act,

shall forever protect the garinshee in respect to the matter involved. And in all cases of garnishment under this act the receiver may test the truth of the garnishee's answer, by filing a statement under oath that he believes the answer to be untrue, specifying the particulars in which he believes the garnishee has by omission or commission not answered truly, whereupon the court shall cause an issue to be made between the receiver and the garnishee, and judgment rendered as upon other issues. And in all cases of litigation under this act, the receiver may propound interrogatories to the adverse party touching any matter involved in the litigation, a copy of which shall be served on the opposite party or his attorney, and which shall be answered under oath within thirty days of such service, and upon failure so to answer, the court shall make such disposition of the cause as shall to it seem most promotive of justice, or shall deem answers to the interrogatories necessary to secure a discovery, the court shall imprison the party in default until further answer shall be made.

§ 9. It shall be the duty of the District Attorney of the Confederate States, diligently to prosecute all causes instituted under this act, and he shall receive as a compensation therefor two per cent. upon and from the fruits of all litigation instituted under this act: Provided, further, That no matter shall be called litigation except a defendant be admitted by the court, and a proper plea be filed.

§ 10. Be it further enacted, That each receiver appointed under this act shall at least every six months, and as much oftener as he may be required by the court, render a true and perfect account of all matters in his hands or under his control under the law, and shall make and state just and perfect accounts and settlements under oath of collections of moneys and disbursements under this law, stating accounts and making settlements of all matters separately in the same

way as if he were administrator of several estates of deceased persons by separate appointments. And the settlements and decrees shall be for each case or estate separately, so that the transaction in respect to each alien enemy's property may be kept recorded and preserved separately. No settlements as above provided, shall, however, be made till judgment or decree of sequestration shall have passed, but the court may at any time pending litigation require an account of matters in litigation and in possession of the receiver, and may make such orders touching the same as shall protect the interest of the parties concerned.

§ 11. When the accounts of any receiver shall be filed respecting any matter which has passed sequestration: the court shall appoint a day for settlement, and notice thereof shall be published consecutively for four weeks in some newspaper near the place of holding the court, and the clerk of the court shall send a copy of such newspaper to the District Attorney of the Confederate States for the court where the matter is to be heard, and it shall be the duty of said District Attorney to attend the settlement, and represent the government, and to see that a full, true and just settlement is made. The several settlements preceding the final one shall be interlocutory only, and may be impeached at the final settlements, which latter shall be conclusive unless reserved or impeached within two years for fraud.

§ 12. Be it further enacted, That the court having jurisdiction of the matter shall, whenever sufficient cause is shown therefor, direct the sale of any personal property other than slaves sequestered under this act, on such terms as it shall seem best, and such sale shall pass the title of the person as whose property the same has been sequestered.

§ 13. All settlements of accounts of receivers for sequestered property shall be recorded, and a copy thereof shall be forwarded by the clerk of the court to

the Treasurer of the Confederate States within ten days after the decree, interlocutory or final, has been passed, and all balances found against the receiver shall by him be paid over into the court, subject to the order of the Treasurer of the Confederate States, and upon the failure of the receiver for five days to pay over the same, execution shall be issued therefor, and he shall be liable to attachment by the court and to suit upon his bond. And any one embezzling any money under this act shall be liable to indictment, and on conviction shall be confined at hard labor for not less than six months, nor more than five years, in the discretion of the court, and fined in double the amount embezzled.

§ 14. Be it further enacted, That the President of the Confederate States, shall, by and with the consent of Congress or of the Senate, if the appointment be made under the permanent government, appoint three discreet commissioners, learned in the law, who shall hold at the seat of government two terms each year, upon notice given, who shall sit so long as the business before them may require; whose duty it shall be, under such rules as they may adopt, to hear and adjudge such claims as may be brought before them by any one aiding this Confederacy in the present war against the United States, who shall allege that he has been put to loss under the act of the United States in retaliation of which this act is passed, or under any other act of the United States, or of any state thereof, authorizing the seizure, condemnation, or confiscation of the property of any citizen or resident of the Confederate States, or other person aiding said Confederate States in the present war with the United States, and finding of such commissioners in favor of any such claim shall be prima facie evidence of the correctness of the demand, and whenever Congress shall pass the claim, the same shall be paid from any money in the Treasury derived from sequestration under this act: Provided,

that said board of commissioners shall not continue beyond the organization of the Court of Claims provided for by the constitution; to which Court of Claims the duties therein provided to be discharged by commissioners shall belong upon the organization of said court. The salaries of said commissioners shall be at the rate of two thousand five hundred dollars per annum, and shall be paid from the Treasury of the Confederacy. And it shall be the duty of the Attorney-General or his assistant, to represent the interests of this government in all cases arising under this act before said Board of Commissioners.

§ 15. Be it further enacted, That all expenses incurred in proceedings under this act shall be paid from the sequestration fund, and the judges, in settling accounts with receivers, shall make to them proper allowances of compensation, taking two and a half per cent. on receipts, and the same amount on expenditures as reasonable compensation in all cases. The fees of the officers of the court shall be the same as allowed for similar services in such cases, to be paid, however, only from the sequestration fund: Provided, however, That all sums realized by any receiver in one year for his services exceeding five thousand dollars shall be paid into the Confederate Treasury for the use of the Confederacy.

§ 16. Be it further enacted, That the Attorney-General shall prescribe such uniform rules of proceeding under this law, not herein otherwise provided for, as shall meet the necessities of the case.

§ 17. Be it further enacted, That appeals may lie from any final decision of the court under this law, in the same manner and within the same time as is now, or hereafter may be by law prescribed for appeals in other civil cases.

§ 18. Be it further enacted, That the word "person" in this law includes all private corporations; and in all cases where corporations become parties, and

this law requires an oath to be made, it shall be made by some officer of such corporation.

§ 19. Be it further enacted, That the courts are vested with jurisdiction, and required by this act to settle all partnerships heretofore existing between a citizen and an alien enemy, to separate the interest of the alien enemy and sequester it. And shall also sever all joint rights when an alien enemy is concerned, and sequester the interest of such alien enemy.

§ 20. Be it further enacted, That in all cases of administration of any matter or thing under this act, the court having jurisdiction may make such orders touching the preservation of the property or effects, under the directions or control of the receiver, not inconsistent with the foregoing provisions, as to it shall seem proper. And the receiver may at any time ask and have the instructions of the court or judge, respecting his conduct in the disposition or management of any property or effects under his control.

§ 21. That the treasury notes of this Confederacy shall be receivable in payment of all purchases of property or effects sold under this act.

§ 22. Be it further enacted, That nothing in this act shall be construed to destroy or impair the lien, or other rights of any creditor or a citizen, or resident of either of these Confederate States, or of any other person, a citizen or resident of any county, state, or territory, with which this Confederacy is in friendship, and which person is not in actual hostility to this Confederacy. And any lien or debt claimed against any alien enemy within the meaning of this act, shall be propounded, and filed in the court in which the proceedings of sequestration are had within twelve months from the institution of such proceedings for sequestration, and the court shall cause all proper parties to be made, and notices to be given, and shall hear and determine the respective rights of all parties concerned ;

Provided, however, That no sales or payments over of money shall be delayed for or by reason of such rights or proceedings, but any money realized by the receiver, whether paid into the court or treasury or still in the receiver's hands, shall stand in lieu of that which produced said money, and be held to answer the demands of the creditors aforesaid in the same manner as that which produced such money was. And all claims not propounded and filed as aforesaid, within twelve months as aforesaid, shall cease to exist against the estate, property, or effects sequestrated, or the proceeds thereof.

Approved August 30, 1861.

THE IMPRESSMENT ACT.

CHAP. X.—An act to regulate Impressments.

The Congress of the Confederate States of America do enact : That whenever the exigencies of any army in the field are such as to make impressments of forage, articles of subsistence or other property absolutely necessary, then such impressments may be made by the officer or officers whose duty it is to furnish such forage, articles of subsistence or other property for such army. In cases where the owner of such property, and the impressing officer, upon an affidavit in writing of the owner of such property, or his agent, that such property was grown, raised or produced by said owner, or is held or has been purchased by him, not for sale or specification, but for his own use or consumption to cause the same to be ascertained and determined by the judgment of two loyal and disinterested citizens of the county or parish in which such impressments may be made ; one to be selected by the owner ; one by the impressing officer ; and in the event of their disagreement, these two shall choose an umpire of like qualification whose decision shall be final. The persons thus selected, after an oath to appraise the property impressed fairly and impartially (which oath, as well as the affidavit provided for in this section the impressing officer is hereby authorized to administer and certify) shall proceed to assess just compensation for the property so impressed, whether the absolute ownership or the temporary use thereof only is required.

§ 2. That the officer or person impressing property, as aforesaid, shall at the time of said taking, pay to

the owner, his agent or attorney, the compensation fixed by said appraisers ; and shall also give to the owner, or person controlling said property, a certificate, over his official signature, specifying the battalion, regiment, brigade, division or corps to which he belongs ; that said property is essential for the use of the army, could not be otherwise procured, and was taken through absolute necessity ; setting forth time and place when and where taken, the amount of compensation fixed by said appraisers, and the sum, if any, paid for the same. Said certificate shall be evidence for the owner as well of the taking of said property for the public use, as the right of the owner to the amount of compensation fixed as aforesaid. And in case said officer or person taking said property shall have failed to pay the owner or his agent said compensation as hereinbefore required, then said owner shall be entitled to the speedy payment of the same by the proper disbursing officer, which when so paid shall be in full satisfaction of all claims against the government of the Confederate States.

§ 3. Whenever the appraisement provided for in the first section of this act shall for any reasons be impracticable at the time of said impressment, then, in that case the value of the property shall be assessed as soon as possible, by two loyal and disinterested citizens of the county or parish wherein the property was taken, chosen as follows : one by the owner and one by the commissary or quarter-master general, or his agent, who in case of disagreement, shall choose a third of like qualifications, as an umpire to decide the matter in dispute ; who shall be sworn as aforesaid, who shall hear the proofs adduced by the parties as to the value of said property, and assess a just compensation therefor according to the testimony.

§ 4. That whenever the Secretary of War shall be of opinion that it is necessary to take private property for public use, by reason of the impracticability of procuring

the same by purchase so as to accumulate necessary supplies for the army, or the good of the service in any locality, he may by general order, through the proper subordinate officer, authorize such property to be taken for public use ; the compensation due the owner for the same to be determined and the value fixed as provided for in the first and second sections of this act.

§ 5. That it shall be the duty of the President as soon as practicable after the passage of this act, to appoint a commissioner in each state, where property shall be taken for the public use, and request the governor of such states in which the President shall appoint said commissioner, to appoint another commissioner to act in conjunction with the commissioners appointed by the President, who shall receive a compensation of eight dollars per day, and ten cents per mile as mileage, to be paid by the Confederate Government. Said commissioners shall constitute a board, whose duty it shall be to fix upon the prices to be paid by the government, for all property impressed or taken for the public use as aforesaid, so as to afford a just compensation to the owners thereof. Said commissioners shall agree upon and publish a schedule of prices every two months, or oftener if they deem it proper ; and in the event they shall not agree in any matter confided to them, they shall have the power to appoint an umpire to decide the matter in dispute, whose decision shall be the decision of the board ; and the said umpire shall receive the same rate of compensation for the time he shall serve, allowed the said commissioners respectively ; Provided, The said commissioners shall be residents of the states for which they shall be appointed ; and if the governor of any state shall refuse or neglect to appoint said commissioner within ten days after requested to do so by the President, then the President shall appoint both commissioners, by and with the consent of the Senate.

§ 6. That all property impressed or taken for the

public use, as aforesaid, in the hands of any persons other than the persons who, have raised, grown, or produced the same, or persons holding the same for their own use or consumption, and who shall make the affidavit as heretofore required, shall be paid for according to the schedule of prices fixed by the commissioners as aforesaid. But if the officer impressing or taking for public use such property, and the owner shall differ as to the quality of the article or property impressed or taken, thereby making it fall within a higher or lower price named in the schedule of prices fixed by the commissioners aforesaid, then the owner or agent, and officer impressing or taking as aforesaid, may select each a loyal and disinterested citizen, of the qualifications as aforesaid, to determine the quality of said article or property, who shall in case of disagreement, appoint an umpire of like qualifications, and his decision, if approved by the officer impressing, shall be final; but if not approved, the impressing officer shall send the award to the commissioners of the state where the property is impressed, with his reasons for disapproving the same, and said commissioners shall hear such proofs as the parties may respectively adduce, and their decision shall be final: Provided, That the owner may receive the price offered by the impressing officer, without prejudice to his claim to receive higher compensation.

§ 7. That the property necessary for the support of the owner and his family, and to carry on his ordinary agricultural and mechanical business, to be ascertained by appraisers, to be appointed as provided in the first section of this act, under oath, shall not be taken or impressed for the public use; and when the impressing officer can not agree as to the quantity of property necessary as aforesaid, then the decision of the appraisers shall be binding on the officer and all other persons.

§ 8. Where property has been impressed for temporary use, and is lost or destroyed without the fault of the owner, the government of the Confederate States shall pay a just compensation therefor; to be appointed by appraisers, appointed and qualified as provided in the first section of this act. If such property when returned has, in the opinion of the owner, been injured while in the public use, the amount of damage thereby sustained to be determined in the manner described in the third section of this act, the officer returning the property being authorized to act in behalf of the government; and upon such inquiry the certificate of the value of the property when originally impressed shall be received as *prima facie* evidence of value thereof.

§ 9. Where slaves are impressed by the Confederate Government to work on fortifications or other public works, the impressment shall be made by said government according to the rules and regulations provided in the laws of the state where they are impressed, and in the absence of such laws in accordance with such rules and regulations not inconsistent with the provisions of this act, as the Secretary of War shall from time to time prescribe: Provided, That no impressment of slaves shall be made when they can be hired by consent of the owner or agent.

§ 10. That previous to the first day of December next, no slaves laboring on a farm or plantation exclusively devoted to the production of provisions and grain, shall be taken for the public use without the consent of the owner, except in case of urgent necessity.

§ 11. That any commissioned or non-commissioned officer or private who shall violate the provisions of this act, shall be tried before the Military Court of the corps to which he is attached, on complaint made by the owner or other person, and on conviction, if an officer, he shall be cashiered and put into the ranks

as a private, and if a non-commissioned officer or private, he shall suffer such punishment, not inconsistent with military law as the court may direct.

Approved March 26, 1863.

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ACTIONS.

1. Legal rights could neither be created nor defeated by the action of the Government of the Confederate States. *Shortridge & Co. v. Macon*, 136.
 2. The rule that personal actions die with the person is peculiar to common law, traceable to the feudal system and its forfeitures, and does not obtain in admiralty. *The Sea Gull*, 145.
- See CORPORATIONS, 2, 3 ; DEATH ; LIMITATIONS OF ACTIONS ; STATES, 10 ; WAR, 15-18.

ADMIRALTY.

1. The admiralty jurisdiction conferred by the Constitution upon the national courts embraces all contracts of a maritime character to be performed upon navigable waters. And though the contract is to be performed wholly within ports of the same state, this does not exclude the jurisdiction of these courts. *The Mary Washington*, 125.
2. The rule that personal actions die with the person is peculiar to common law, traceable to the feudal system and its forfeitures, and does not obtain in admiralty. *The Sea Gull*, 145.
3. The process to enforce the remedy for a wrong done or injury incurred by the death of a person, may be either *in personam* or *in rem*. *Ib.*
4. A husband can recover by a proceeding *in rem* against the vessel which caused the death of his wife, for the injury suffered by him thereby. *Ib.*
5. The admiralty may be styled the humane Providence which watches over the rights and interests of those "Who go down to the sea in ships, and do their business on the great waters." *The Highland Light*, 150.
6. Its jurisdiction for marine torts may be said to be co-extensive with the subject. It depends on the locality of the wrong, not

ADMIRALTY—*Continued.*

upon its extent, character, or the relations of the person injured. *Ib.*

7. The case of an action by the widow and son of a hand killed on a steamboat by the negligence of the engineer, distinguished from that of the *Sea Gull*, where the injury was *by the vessel herself* to the wife of the libellant, who was an employee on another vessel; and the remedy there held to have been either *in rem* or *in personam*. In this case the injury is to an employee of the owners on their own ship, the injury being caused by the negligence of a co-employee. This court would hesitate to apply to this case the common-law rule that one employee can not hold his employer responsible for injuries caused by the fault of his co-employee. *Ib.*
8. The statute law of Maryland, however, furnishes a clear right and a plain remedy, and the right may be enforced in this court by admiralty processes. *Ib.*
9. It is not necessary to pursue a statutory remedy in order to enforce a statutory right. *Ib.*
10. The Acts of Congress confine the remedy *in rem* for injuries from injurious escape of steam to actions brought by passengers—and the remedy *in personam* against owners for such injuries done to others on board. *Ib.*
11. It is obvious that Congress intended by these laws to provide for all cases of redress for injuries from these causes, and no action for such injuries can be maintained unless sanctioned by its legislation. *Ib.*
12. No remedy in this case can be had in this court except by an action *in personam* against the owners, and this libel was, therefore, properly dismissed by the court below. *Ib.*
13. In a libel to decree goods forfeited by reason of a fraud on the revenue laws, admiralty has jurisdiction, although part of the goods have been landed before the seizure. *250 Barrels of Molasses and other Merchandise v. United States*, 502.
14. But if admiralty had no jurisdiction, this must be pleaded, and the objection could not be made otherwise. *Ib.*
15. Under the Act of March 3, 1863, if it be attempted to practice fraud upon the revenue in regard to only a portion of the cargo imported, the whole of the cargo belonging to the party attempting to commit the fraud is forfeited. *Ib.*
16. On an appeal from the District Judge in an admiralty cause to the Circuit Court, the trial in the Circuit Court is *de novo*; and the opinion of the District Judge can not be read. *Ib.*

See COURTS 13, 14; PLEADING; SALVAGE.

AGENCY.

1. The late civil war did not revoke an agency established in one of the southern states before the war, by a citizen of one of the northern states. *Botts & Darnall v. Crenshaw*, 224.
2. An attorney in Virginia collected a claim entrusted to him before the war by a citizen of Kentucky, in Confederate money, during the war, and invested the same in Confederate bonds by order of a Virginia State Court. He is liable after the war for the value of the Confederate money as of the date when he received it. *Ib.*
3. An order of the Hustings court of the city of Richmond, authorizing the attorney to invest funds collected by him for citizens of Kentucky, in Confederate bonds, which perished by the result of the war, will not be recognised in this court. *Ib.*
4. The late civil war did not revoke an agency in the Southern States established before the war by a citizen of one of the Northern States. *Anderson v. The Bank*, 535.
5. But such an agent was bound to act with due care and diligence. *Ib.*
6. The receipt of Confederate treasury notes in payment of a debt due to a citizen adhering to the National Government was not the exercise of such diligence. *Ib.*
7. Such receipt did not discharge the debtor from his debt, though paid in form, and the notes delivered to him as paid by the agent were not paid in fact. *Ib.*
8. Nothing could discharge him except ratification of the acts of the agent or voluntary release by the creditor, or actual payment in lawful money. *Ib.*
9. The agent can not be sued along with the debtor for the amount of the debt without an averment of the insolvency of the debtor. *Ib.*
10. But this having been done, the plaintiff may either amend his bill and charge the insolvency of the principal, or he may, under the circumstances, take a decree against the agent for the value of the Confederate currency paid by the debtor, and a further decree against the debtor for what would then remain due after crediting this on the debt. *Ib.*
11. If the plaintiff is not content with such a decree, he may amend his bill by alleging the insolvency of the debtor, and loss of his debt through the unauthorized action of the agent. *Ib.*

ALIENS.

See TAXES, 1.

AMENDMENT.

Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. *Cæsar Griffin's Case*, 364.

APPEAL.

On an appeal from the District Judge in an admiralty cause to the Circuit Court, the trial in the Circuit Court is *de novo*; and the opinion of the District Judge can not be read. *250 Barrels of Molasses and other Merchandise v. United States*, 502.

See BANKRUPTCY, 20-26; CONFISCATION, 3-6; PARTIES, 1.

APPRENTICES.

1. The "civil rights bill" is constitutional, and applies to all conditions prohibited by it, whether originating before or since its enactment. *Ex parte Turner*, 157.
2. A colored person held under an indenture of apprenticeship made under a statute of Maryland, which provides for such persons being apprenticed on terms much less favorable to them than those provided for white persons, discharged. *Ib.*

ASSIGNMENT.

See BANKRUPTCY, 1, 14, 15.

ATTACHMENT.

1. The master of a vessel may lawfully refuse to deliver goods to the consignee which, having been attached on his vessel, are carried to the port of consignment under an agreement with the sheriff that they should be returned. *The Lord*, 527.
2. Goods are being shipped from N. to W., some of which are on the wharf, some on the steamer. At this time the sheriff levies an attachment on them, but those on the steamer being covered up by other goods, and difficult to remove, he allows the captain to proceed with them under an agreement that he will bring them back. When the steamer arrives at W., the consignee tenders the freight, and demands the goods. The captain might lawfully refuse to deliver them up. *Ib.*
3. A steamer being in custody of the marshal in a proceeding in admiralty, a state court has no jurisdiction to take it on attachment; therefore a judgment in such attachment creates no lien upon the steamer. *The Croatan*, 546.

ATTORNEYS.

See AGENCY, 2, 3.

BANKRUPTCY.

1. An assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed, subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but the assignee represents the rights of creditors as well as the rights of the bankrupt; and any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee. *Re Wynne*, 227.
2. When the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into. *Ib.*
3. Though the bankrupt act purports to have been approved March 2, 1867, yet, as that day was Saturday, and it did, in fact, embrace Sunday and Monday, the bankrupt act did not become a law until the latter day. *Ib.*
4. Consequently, a deed of trust which was recorded on March 2, 1867, is not avoided by the bankrupt act. *Ib.*
5. Nothing in the thirty-fifth section of the bankrupt act affecting a deed, it may well be doubted whether, if the bankrupt act had been approved before the recording of it, its effect would have been altered. *Ib.*
6. *It seems* that as the Virginia statute against fraudulent conveyances avoids all deeds of trust as to creditors until and except from the time they are duly admitted to record, the assignee in bankruptcy would receive the benefit of that statute, and would take the property free from all claims under such deeds. *Ib.*
7. It can not be held that all mortgages or other securities not expressly included in the first clause of the second general proviso in the fourteenth section of the bankrupt act are invalidated by that act. To hold such to be the law would give to the act an *ex post facto* operation. *Ib.*
8. A deed of trust is made on December 8, 1866, and is recorded March 2, 1867. The recording of the deed can not be held to be an act of bankruptcy, that being altogether the act of the party. So far as the grantor is concerned, whatever consequences flow from his act, must attach to the act of making the deed on December 8, 1866. *Ib.*
9. Nor is it to be regarded as a deed executed on the day of its recordation, and therefore as a deed creating a preference on that day, as against creditors. *Ib.*
10. It is as much the policy of the bankrupt act to uphold liens

BANKRUPTCY—Continued.

and trusts when valid, as it is to set them aside when invalid. *Ib.*

11. *It seems* that knowledge that a party is embarrassed in carrying out his business for want of means, is not sufficient to fix on a grantee in a trust deed knowledge of his insolvency, if he fully believed that his property was more than sufficient to pay all his debts. *Ib.*
12. No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed in bankruptcy, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested. *Ib.*
13. A lien is given to a landlord, of a high and peculiar character, by the twelfth section of chapter 128 of the code of Virginia, ed. 1868. The landlord's lien under that statute is given by the statute, independently of proceedings by distress warrant or attachment, which are remedies, in case of a bankrupt, superseded by the effect and operation of the bankrupt act. *Ib.*
14. Assignees in bankruptcy of a firm sent back to the register for additional proof of a certain claim of M., proved by the oath of a member of the firm as trustee of the claimant. On application to the District Judge by the counsel of the trustee, it was ordered that dividend on the claim be paid. *Re Mitteldorfer & Co.*, 276.
15. The assignee had no notice of the application, and petitioned the Circuit Court to review the case, and to reverse the said order. *Held*, the District Court has power upon petition of the contesting creditor, to reverse the decision of an assignee rejecting his claim, but the mode of proceeding must be regular, and the assignee should have opportunity to answer and contest the claim; order of the District Court reversed. *Ib.*
16. *Semble*: That a member of a bankrupt firm can not represent claims against the estate. *Ib.*
17. When one or more creditors petition for and procure an adjudication of bankruptcy against a debtor, they may on motion be reimbursed their reasonable expenses. *Re Mitteldorfer*, 288.
18. The fund is the fruit of the diligence of such creditors, and it would be manifestly unjust to compel them to bear alone the expenses incurred for the benefit of all. *Ib.*
19. Whenever a claim for reasonable expenses so incurred is made and admitted by the assignee, an order should be made by the District Judge for its payment. *Ib.*
20. The jurisdiction of superintendence conferred upon the Circuit Court by the second section of the bankrupt act, must be exer-

BANKRUPTCY—Continued.

cised over proceedings in bankruptcy already pending in the District Court, and it seems to be a reasonable interpretation that it does not extend to decisions of the District Court from which appeals may be taken. *Matter of Alexander*, 295.

21. By the eighth section of the bankrupt act, appellate jurisdiction is given to the Circuit Court in four classes of cases: 1. By appeals in cases in equity decided in the District Court, under the jurisdiction created by the act; 2. By writ of error in cases at law decided in the exercise of that jurisdiction; 3. By appeal from decisions rejecting wholly or in part the claims of supposed creditors; and, 4. By appeal from decisions allowing such claims. *Ib.*
22. The suits belonging to the first two classes of cases seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the eighth section; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the District Court elsewhere than in the third clause of the second section, though this jurisdiction may be well enough held to be included in the general grant of the first section. *Ib.*
23. The appellate jurisdiction, strictly so called, conferred upon the Circuit Courts, is limited to controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants, touching the allowance of claims. *Ib.*
24. The right of appeal, as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeals is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal, in any case, under the bankrupt act, from the District Court, unless it is claimed, and the bond is filed at the time it is claimed, and notice of it is given, as required by the eighth section of the act, within ten days after the entry of the decree or decision appealed from; or unless it is entered at the term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed. *Ib.*
25. The only construction which gives due effect to all parts of the act relating to revisory jurisdiction seems to be that which on the one hand excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the eighth section, and, on the other, brings within that category all decisions of the District Court or the District Judge at chambers, which can not be

BANKRUPTCY—Continued.

reviewed upon appeal or writ of error under the provisions of that section. *Ib.*

26. The exercise of this jurisdiction is left to the sound discretion of the Circuit Courts. *Ib.*

BELLIGERENT RIGHTS.

1. It is the practice of modern governments, when attacked by formidable rebellion, to exercise and concede belligerent rights. These are concessions made by the legislative and executive departments in the exercise of political discretion. They establish no rights except during the war. *Shortridge & Co. v. Macon*, 136
2. The national government conceded belligerent rights to the armies of the Confederate States, and acts of a strictly military character, performed under military authority, may be protected by this concession. *United States v. Morrison*, 521.

BONDS.

See EXECUTORS AND ADMINISTRATORS; TAXES, 2-4.

BOTTOMRY.

See SHIPPING, 5, 6.

CARRIERS.

1. The duty of a common carrier by water is not fulfilled by simply transporting from port to port; he must land the goods, and give a reasonable opportunity to the consignee to ascertain their condition. *The Mary Washington*, 125.
2. The general rule requires that a carrier shall notify the consignee of the arrival of the goods, that opportunity may be given for inspection and removal of them. *Ib.*
3. If exceptions are made by usage, circumstances, or special arrangement, they must be proved. *Ib.*
4. A custom by a carrier to deposit goods in his warehouse, where the consignee is expected to call, without giving him notice of their arrival, must be shown to have been known by the consignee, and assented to by him, in order to discharge the carrier from liability. *Ib.*
5. The fact that after receiving such notice the consignee refuses to take the goods, can not relieve the carrier from liability for injury sustained by them *before* that time. *Ib.*
6. The master of a vessel may lawfully refuse to deliver goods to the consignee which, having been attached on his vessel, are carried to the port of consignment under an agreement with the sheriff that they should be returned. *The Lord*, 527.

CARRIERS—Continued.

7. Goods are being shipped from N. to W., some of which are on the wharf, some on the steamer. At this time the sheriff levies an attachment on them, but those on the steamer being covered up by other goods, and difficult to remove, he allows the captain to proceed with them under an agreement that he will bring them back. When the steamer arrives at W., the consignee tenders the freight, and demands the goods. The captain might lawfully refuse to deliver them up. *Ib.*

CIRCUIT COURTS.

See ADMIRALTY, 16; BANKRUPTCY, 14, 15, 20-26.

CITIZENS.

1. Colored persons equally with white persons are citizens of the United States. *Ex parte Turner*, 157.
2. The "civil rights bill" is constitutional, and applies to all conditions prohibited by it, whether originating before or since its enactment. *Ib.*
3. A colored person held under an indenture of apprenticeship made under a statute of Maryland, which provides for such persons being apprenticed on terms much less favorable to them than those provided for white persons, discharged. *Ib.*

CONFEDERATE STATES.

1. Legal rights could neither be created nor defeated by the action of the government of the Confederate States. *Shortridge & Co. v. Macon*, 136.
2. The term *de facto*, as descriptive of a government, has no fixed and definite sense. It is perhaps most correctly used as signifying a government completely, though only temporarily, established in place of the lawful or regular government, occupying its capital and exercising its power. *Keppel's Adm'rs v. Petersburg R. R. Co.*, 167.
3. The term, however, is often used, and perhaps more frequently, in a sense less precise, as signifying any organized government established for the time over a considerable territory, in exclusion of the regular government. A *de facto* government of this sort is not distinguishable in principle from other unlawful combinations. It is distinguishable, in fact, mainly by power, and in territorial control, and by the policy usually adopted in relation to it by the national government. *Ib.*
4. It can not be maintained that levying war against the United States by persons, however combined and confederated (even though suc-

CONFEDERATE STATES—Continued.

- cessful in establishing their actual authority in several States), would not be treason. *Ib.*
5. In the more correct sense of the word, the Confederate Government was never a *de facto* government. *Ib.*
 6. It may well be doubted whether in this country treason against the United States could be committed in obedience to a usurping President and Congress, exercising unconstitutional and unlawful power at the seat of the National Government. *Ib.*
 7. Acts done under the authority of an insurgent body, actually organized as a government within a large extent of territory, not merely in hostility to the regular government, but in complete exclusion of it from the whole territory subject to insurgent control, when in hostility to the regular government, can not be recognized as lawful. *Ib.*
 8. All transactions between individuals which would be legal and binding under ordinary circumstances, can not be pronounced illegal and of no obligation, because done in conformity with laws enacted or directions given by the usurping power. *Ib.*
 9. Between these extremes there is a large variety of transactions, to which it is difficult to apply any general rule. *Ib.*
 10. Transactions of the Confederate Government prejudicial to the interests of citizens of other states, excluded by the insurrection and by the policy of the National Government from the care and oversight of their own interests within the states of the Confederacy, can not be upheld in the courts of the United States. *Ib.*
 11. The Confederate Government can not be regarded as a *de facto* government in any such sense that its acts are entitled to judicial recognition as valid. *Ib.*
 12. The acts of the Confederate Government confiscating or sequestering property of citizens within the states adhering to the government of the United States, were null, and of no effect. *Ib.*
 13. In order that one may shield himself from liability upon the ground that the property was taken from him under the stress of *Vis Major*, he must show that the property was set apart specially for the owner, and was taken from him without consent on his part, by force, either actual or menaced, under circumstances amounting to duress. *Ib.*
 14. The P. R. R. Co. was a railroad company in the state of Virginia during the war. K., who resided in Philadelphia during that time, owned stock in it. This stock was confiscated by a decree of the District Court of the Confederate States, and certain dividends declared by the company were paid on this stock to a receiver appointed by the court without resistance or protest

CONFEDERATE STATES—Continued.

by the company. After the war began, K. sued the company.
Held,

1. The confiscation was wholly null and void.
2. The company are liable for the dividends declared during the war, but only for a sum equal to what the Confederate money in which they were declared was worth at the time they were declared, with the interest from the time demand was made, which was from filing of the bill. *Ib.*
15. An excuse which would avail a carrier for hire for non-delivery, might excuse such a debtor from non-payment to his creditor. *Ib.*
16. Any draft, bill, or note drawn in the Confederate States, or in any state, under the proclamation of the President declared in insurrection, or in any part of them (except such part as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the Federal lines, was absolutely void as to the maker and all other parties thereto, and was not to be received in payment or satisfaction of any debt due to a citizen of a state adhering to the Government. *Moore & Brother v. Foster & Moore*, 222.
17. When such a draft has been received, the jury must be satisfied upon good evidence that it was accepted in satisfaction of the debt. *Ib.*
18. It is settled law that all acts of the Confederate Government, or the government of a state hostile to the United States, and prejudicial to the rights of citizens of states adhering to the Union, are void, and convey no title. *Perdicaris v. Charleston Gas-light Co.*, 435.
19. The sequestration acts of the Confederate States, and all acts under them, injurious to citizens of Union-adhering states, are null and void, and a court of equity will decree such relief in the premises as may be necessary. *Ib.*
20. The whole existence of the Confederate Government was a continued rebellion against the lawful government of the United States; and no one can be protected by the sanction of its authority save in acts of war. *United States v. Morrison*, 521.
21. The National Government conceded belligerent rights to the armies of the Confederate States, and acts of a strictly military character, performed under military authority, may be protected by this concession. *Ib.*

See CURRENCY; EXECUTORS AND ADMINISTRATORS; LIMITATIONS OF ACTIONS; PAYMENT; POSTMASTERS; STATES.

CONFISCATION.

1. Inasmuch as the Confiscation Acts of August, 1861, and July, 1862, have been several times considered by the Supreme Court in reported cases, and no question has ever been made by counsel or court of the constitutionality of those statutes, it is a fair conclusion that neither the bar nor bench doubted their constitutionality. *Semple v. United States*, 259.
2. This court will hold, therefore, for the present, those acts to be constitutional, but will be gratified to have the question submitted to the Supreme Court, and adjudged upon direct argument and consideration. *Ib.*
3. Proceedings for condemnation of lands under these statutes, may be according to forms used in admiralty, but they must conform to the course of the common law in respect to the trial of issues of fact and exceptions to evidence, and can only be reviewed after final judgment or decree on writ of error, that writ being the process by which common-law proceedings are reviewed—appeal being the appropriate method in causes of admiralty and maritime jurisdiction. *Ib.*
4. In this cause the proceeding has properly been by writ of error. *Ib.*
5. But there being no appearance in the court below, there could be no issue of fact, nor direction for trial by jury, and therefore judgment was properly entered by default. *Ib.*
6. If it appeared by the record that an issue had been made and tried by the court without a jury, and without submission by the parties, the judgment would have been reversed. *Ib.*

See SEQUESTRATION.

CONSCRIPTION.

The conscript act of the Confederate States. *Appendix*, 579.

CONSTITUTIONAL LAW.

1. Operation of section 3 of the fourteenth amendment to the Constitution of the United States as a bar to proceedings upon an indictment found under previous statutes providing for the punishment of treason. *Case of Jefferson Davis*, 1.
2. The prohibitory provisions of the fourteenth amendment to the Constitution of the United States, did not instantly, on the day of its promulgation, vacate all offices held by persons within the category of prohibition, and make all official acts performed by them since that day null and void. *Cæsar Griffin's Case*, 364.
3. The ratification of the fourteenth amendment to the Constitution of

CONSTITUTIONAL LAW—Continued.

the United States, was officially promulgated by the Secretary of State on July 28, 1868. *Ib.*

4. Persons in office by lawful appointment or election before the promulgation of this amendment, were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section. *Ib.*
5. Legislation by Congress was necessary to give effect to the prohibition by providing for such removal. *Ib.*
6. The exercise of their several functions by these officers until removed in pursuance of such legislation, is not unlawful. *Ib.*
7. The whole spirit of the Federal Constitution is against *ex post facto* laws, or bills of attainder in form of trials by jury, and denies to the legislature power to deprive any person of life, liberty, or property without due process of law. *Ib.*
8. A provision which at once without trial deprives a whole class of persons of offices held by them, for cause, however grave, is inconsistent with this spirit and general purpose, and therefore no such construction can be given the third clause of the fourteenth amendment. *Ib.*
9. In the judgment of some enlightened jurists, its legal effect was to remit all other punishment. Such was certainly its practical effect. *Ib.*
10. Provisions of the Constitution of the Confederate States of America. *Appendix, 557.*

See CITIZENS, 2; CONFISCATION, 1, 2.

CONSTRUCTION.

1. A construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. *Cæsar Griffin's Case, 364.*
2. Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. *Ib.*

CORPORATIONS.

1. The moment a dividend is declared by a joint-stock company, the company becomes debtor, and the stockholder creditor for the amount, payable on demand. *Keppel's Adm'rs v. Petersburg R. R. Co., 167.*
2. Where stock has been sold by a Confederate receiver, and new certificates therefor issued to the purchaser, and after the war is

CORPORATIONS—Continued.

ended, such sale is admitted by the company to have been void, and it recognizes the original stockholder, but neglects to take any step to have the certificate issued under the Confederate sale declared void, canceled, or delivered up—in such case any stockholder has a clear equity to have such stock declared void, because it is a cloud on his title and injures the value of his stock.

Perdicaris v. Charleston Gas-light Co., 437.

3. When the company itself refuses or neglects to bring suit, then it is competent for such stockholder, in his own behalf and that of others in like situation with him, to file his bill in equity and invoke the assistance of the equity jurisdiction. *Ib.*

4. The fact that a corporation is insolvent, will not authorize it to apply to a court of equity for a receiver to wind up its affairs; and *semble* that this would also be the case with a private person.

Hugh v. McRae et al., 466.

5. A receiver will be appointed in a proper case at the instance of a creditor, but not at that of the insolvent debtor. *Ib.*

See CONFEDERATE STATES, 14; TAXES, 2–4.

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COURTS.

1. A court of the United States has, in general, no jurisdiction of suits against warehousemen by citizens of the same state. *The Mary Washington*, 125.

2. The admiralty jurisdiction conferred by the constitution upon the national courts embraces all contracts of a maritime character, to be performed upon navigable waters. And though the contract is to be performed wholly within ports of the same state, this does not exclude the jurisdiction of these courts. *Ib.*

3. Address to the gentlemen of the bar of North Carolina, upon opening the session of the Circuit Court of the United States for the District of North Carolina, for the June Term, 1867. *Address of the Chief Justice*, 132.

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9. A suit being in progress in a state court for the settlement of an estate, two of the legatees being non-resident, but having knowledge of this suit, and having been made parties by order of publication, filed their bill in the United States Circuit Court to have the estate administered. *Held*, the latter court has no jurisdiction. *Reid v. Kerfoot & McCormick*, 349.
10. The courts of a state forming part of the Confederate States had no jurisdiction during the civil war over parties residing in states which adhered to the National government. *Livingston v. Jordan*, 454.
11. As between parties residing in South Carolina and parties residing in states adhering to the National Government, the courts of South Carolina could have no jurisdiction while the war continued. *Ib.*
12. A party professing to act as *prochein ami* for infants resident in Maryland, applied to a Court of Equity of South Carolina to ratify a sale made by him of the real estate of the infants lying in South Carolina. The application was made in February, 1861. The application was referred to the master, and proceedings were not finally terminated until April, 1862, when the sale was ratified, and subsequently the purchaser paid the purchase-money in Confederate currency. The professed *prochein ami* was stepfather of the infants, and was, as well as they, resident in Maryland during the whole war. On the restoration of peace they repudiated the whole transaction, and brought ejectment for the land. *Held*, that the proceedings before the South Carolina courts were void, as to them, and that they must recover. *Ib.*
13. A steamer being in custody of the marshal in a proceeding in admiralty, a state court has no jurisdiction to take it on attachment; therefore a judgment in such attachment creates no lien upon the steamer. *The Croatan*, 546.
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14. Such a proceeding in attachment was, in substance and in fact, a proceeding in admiralty, and beyond the jurisdiction of the state

COURTS—Continued.

court. Instead of suing out an attachment in the state court, the creditor should have intervened for his interest in the United States District Court. *Ib.*

See EXECUTION; HABEAS CORPUS; JURIES.

CRIMES.

See TREASON; UNLAWFUL FRANKING.

CURRENCY.

1. The Confederate currency may fairly be said to have been imposed on the country within the control of the Confederate Government by irresistible force. The necessity for using this currency was almost the same as the necessity to live. The court is bound to take judicial notice of the fact that the dollars in Confederate currency were different in value to either description of dollars recognized as lawful money by the laws of the United States. *Keppel's Admr's v. Petersburg R. R. Co.*, 167.
2. An attorney in Virginia collected a claim entrusted to him before the war by a citizen of Kentucky, in Confederate money, during the war, and invested the same in Confederate bonds by order of a Virginia State Court. He is liable after the war for the value of the Confederate money as of the date when he received it. *Botts & Darnell v. Crenshaw*, 224.
3. An order of the Hustings court of the city of Richmond, authorizing the attorney to invest funds collected by him for citizens of Kentucky, in Confederate bonds, which perished by the result of the war, will not be recognized in this court. *Ib.*
4. No city within the Commonwealth of Virginia has power and authority to issue notes for circulation as money of any denomination whatever. *Evans v. City of Richmond*, 551.
5. The city of Richmond issued certain notes in 1861, and others in 1862. The first were issued without authority of law. Subsequently an act of assembly undertook to legalize the former, and to authorize the latter. The court being satisfied from the evidence that they were issued to give aid and support to the war against the United States, they are void. *Ib.*

See EXECUTORS AND ADMINISTRATORS.

DEATH.

1. The process to enforce the remedy for a wrong done or injury incurred by the death of a person, may be either *in personam* or *in rem*. *The Sea Gull*, 145.
2. A husband can recover by a proceeding *in rem*, against the vessel

DEATH—Continued.

which caused the death of his wife, for the injury suffered by him thereby. *Ib.*

3. The widow and son of a hand killed on a steamboat by the negligence of the engineer, have suffered an injury for which they have a remedy against the owners of the vessel. *The Highland Light*, 150.
4. The Act of Congress makes the fact of the injurious escape of steam full *prima facie* proof of negligence to charge the defendant in all actions against proprietors of steamboats for injuries occasioned by injurious escape of steam. *Ib.*
5. This case distinguished from that of the *Sea Gull*. There the injury was *by the vessel herself* to the wife of the libellant, who was an employee on another vessel. The remedy there held to have been either *in rem* or *in personam*. In this case the injury is to an employee of the owners on their own ship, the injury being caused by the negligence of a co-employee. This court would hesitate to apply to this case the common-law rule that one employee can not hold his employer responsible for injuries caused by the fault of his co-employee. *Ib.*
6. The statute law of Maryland, however, furnishes a clear right and a plain remedy, and the right may be enforced in this court by admiralty processes. *Ib.*
7. It is not necessary to pursue a statutory remedy in order to enforce a statutory right. *Ib.*
8. The Acts of Congress confine the remedy *in rem* for injuries from injurious escape of steam to actions brought by passengers—and the remedy *in personam* against owners for such injuries done to others on board. It is obvious that Congress intended by these laws to provide for all cases of redress for injuries from these causes, and no action for such injuries can be maintained unless sanctioned by its legislation. *Ib.*
9. No remedy in this case can be had in this court, except by an action *in personam* against the owners, and this libel was, therefore, properly dismissed by the court below. *Ib.*

See PRACTICE, 5-7.

DELIVERY.

See CARRIERS.]

DISTRICT COURT.

See ADMIRALTY, 16; BANKRUPTCY, 14, 15.

DUTIES.

See ADMIRALTY, 15.

EQUITY.

See CORPORATIONS, 2, 3; INFANTS, 1-3; RECEIVERS.

ERROR (WRIT OF).

See CONFISCATION, 3-6.

EVIDENCE.

See STEAMBOATS, 2.

EXECUTION.

1. Land having been sold under execution upon a judgment of the United States Circuit Court, that court will not, upon motion to that effect, appropriate the proceeds to an older judgment of a state court. The holder of the older judgment should issue his execution and sell the land. *Whitely, Stone & Co. v. Riddick*, 540.
2. *Semble*: a purchase of land sold under an execution from the United States Circuit Court does not take the land free from the lien of an older judgment of a state court. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. It being agreed that the most prudent and careful business men were in the constant habit of making investments in Confederate bonds, it would seem unreasonable to call in question the good faith or prudence of the administrator who does likewise. *Head v. Starke's Adm'r*, 312.
2. Especially is this so when such investment by an administrator is sanctioned by the state court. Even if there had been no such decision, this court will not say that the administrator ought to be charged, if the investment were free from objection on other grounds. *Ib.*
3. It would seem, however, that where a trustee held funds in the Confederacy, for the benefit of parties within and adhering to the United States, that an investment of such funds in Confederate bonds will not exonerate such trustee from accounting for the value of the funds invested to his non-resident *cestuis qui trust*. *Ib.*
4. Dealing in confederate currency which was imposed on the community by irresistible force is essentially different from an actual advance of money to the Confederacy itself. *Ib.*
5. In this case there was an investment of trust funds, entirely voluntary on the part of the administrator, on a loan to the Confederate Government, to aid it in its efforts to dismember the Union. This administrator paid his trust fund actually into the treasury

EXECUTORS, &c.—Continued.

of the Confederate States, and received directly from the treasurer a Confederate bond for the amount so paid in. Such an investment can not receive the sanction of a court of the United States. It is inoperative as a discharge from responsibility. *Ib.*

6. An executor receives payment of a bond given before the war, in Confederate currency, on October 26, 1862. If liable at all, he is only liable for the value of the Confederate currency as of that date. *Howland et al. v. Kelly*, 427.

7. In a suit against the obligor in the bond to cause him to deliver up the bond and pay it again, the executor is a necessary party. *Ib.*

See PRACTICE, 5-7.

FORFEITURE.

See ADMIRALTY, 15.

FRAUDULENT CONVEYANCES.

See BANKRUPTCY, 1-13.

GRAND JURIES.

Duties of the Grand Jury. *Charge to Grand Jury*, 263.

HABEAS CORPUS.

1. A person convicted by a jury, and sentenced in court by a judge *de facto*, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, can not be properly discharged upon *habeas corpus*. *Cæsar Griffin's Case*, 364.

2. G., a colored man, is indicted and tried in the Circuit Court for Rockbridge county, Virginia, for shooting with intent to kill, convicted and sentenced to confinement in the penitentiary for two years. The court was presided over by a judge disqualified to hold office by the fourteenth amendment to the Constitution of the United States, but he had been in office two years before the amendment was adopted. G. applied to the United States Circuit Court for Virginia, to be discharged on *habeas corpus*. *Held*, he can not be discharged. *Ib.*

HUSBAND AND WIFE.

See ADMIRALTY, 4.

IMPRESSMENT.

The impressment act of the Confederate States. *Appendix*, 597.

INDICTMENT.

1. An indictment against a member of Congress for unlawfully franking, need not charge that he franked any letter as a member of Congress, nor that he was a member of Congress when the offense was committed. *Deweese's Case*, 531.
2. If this were otherwise, the indictment charging that "J. T. D., member of Congress," committed the offense, sufficiently charged that he did it whilst a member of Congress. *Ib.*
3. In an indictment for a statutory offense, it is sufficient if the offense be substantially set forth, though not in the precise words of the act. *Ib.*
4. An allegation in an indictment that a member of Congress franked letters, not written by himself, namely, envelopes which he consented should be used by one C., for the purpose of transmitting through the mail certain matter properly chargeable with postage, sufficiently excludes the possibility that the letters were written by the order of the defendant on the business of his office. *Ib.*

INFANTS.

1. No person has a right to intervene as a volunteer for a minor child, and make a contract for a sale of a minor's estate. *Livingston v. Jordan*, 454.
2. If such a volunteer has made such a contract, a court of equity afterwards has not jurisdiction to ratify it. *Ib.*
3. A party professing to act as *prochein ami* for infants resident in Maryland, applied to a court of equity of South Carolina to ratify a sale made by him of the real estate of the infants lying in South Carolina. The application was made in February, 1861. The application was referred to the master, and proceedings were not finally terminated until April, 1862, when the sale was ratified, and subsequently the purchaser paid the purchase-money in Confederate currency. The professed *prochein ami* was stepfather of the infants, and was, as well as they, resident in Maryland during the whole war. On the restoration of peace they repudiated the whole transaction, and brought ejectment for the land. *Held*, that the proceedings before the South Carolina courts were void, as to them, and that they must recover. *Ib.*

INJUNCTION.

See Courts, 6.

INTEREST.

1. The suspension of intercourse consequent upon the recent war, did not prevent interest from accruing between citizens adhering to the respective parties thereto. *Shortridge & Co. v. Macon*, 136.

INTEREST—Continued.

2. The Supreme Court of the United States having held (*Hanger v. Abbott*, 6 Wall. 532) that the late war suspended the statute of limitations, and in *Ward v. Smith* (7 Wall. 452), that interest did accrue during the war, in that particular case, making an exception to the general rule that interest does not accrue between citizens or subjects of belligerent states, it may not unreasonably be inferred from the language of the court that if the direct question came before them it would be decided that interest did not accrue between parties to the late civil war. *Bigler v. Waller*, 316.
3. It is the duty of this court to decide the question as it believes the Supreme Court would decide it. *Ib.*
4. *Bigler*, a citizen of New York, was indebted to *Waller*, a citizen of Virginia, in the sum of thirteen thousand dollars, due for land sold by *Waller* to *Bigler*, which sum was due and payable May 10, 1861. *Bigler* was excluded from occupation of the estate during the war, the improvements placed on it by him were greatly injured, and *Waller* was entitled to possession during the war by virtue of a sale under a trust deed and purchase by him of the property. If interest on a debt should cease in any case it should in this. *Ib.*

See TAXES, 2-4.

JUDGES.

See HABEAS CORPUS.

JUDGMENT.

See EXECUTION; PRACTICE, 5.

JURIES.

1. The practice of the state courts in relation to summoning juries, whether statutory or otherwise, does not become the practice of the United States courts until expressly adopted by the latter. *Alston v. Manning*, 460.
2. A jury was summoned according to what had for a long time been the practice of the courts, and the statutory requirements of the state of South Carolina. But before the summoning of the jury, those statutory requirements and the practice of the state courts had been materially modified. The jury is properly summoned. *Ib.*

See GRAND JURIES.

JURISDICTION.

1. A court of the United States has, in general, no jurisdiction of

JURISDICTION—Continued.

suits against warehousemen by citizens of the same state. *The Mary Washington*, 125.

2. The admiralty jurisdiction conferred by the constitution upon the national courts embraces all contracts of a maritime character to be performed upon navigable waters. And though the contract is to be performed wholly within ports of the same state, this does not exclude the jurisdiction of these courts. *Ib.*
3. Courts have no policy and can exercise no political powers. They can only declare the law. *Shortridge & Co. v. Macon*, 136.
4. The jurisdiction of the admiralty over marine torts, may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the person injured. *The Highland Light*, 150.

See ADMIRALTY, 13, 14; BANKRUPTCY, 20-26; COURTS, 6-12; EXECUTION; INFANTS, 1, 2.

LANDLORD AND TENANT.

See BANKRUPTCY, 13; MARSHAL.

LIBEL.

See PLEADING.

LIENS.

See BANKRUPTCY, 1, 10-13; EXECUTION; SHIPPING.

LIMITATIONS OF ACTIONS.

1. The statute of limitations was suspended as between citizens of the Confederate States and citizens of those states which adhered to the national government during the whole period of the war. *Gording v. Varn*, 286.
2. As far as South Carolina is concerned, the war began April 19, 1861, and ended April 1, 1866. *Ib.*

MARSHAL.

1. The United States marshal is compensated for his official service by fees, and can not lawfully rent any building in his custody, except under order of the court. *Perrin v. Epping*, 430.
2. If he rents such property without authority, he is responsible in damages for any injury done to it in consequence. *Ib.*

MASTER.

See SHIPPING, 5, 6.

MASTER AND SERVANT.

See ADMIRALTY, 7, 8.

MORTGAGES.

1. A mortgage or other conveyance made as a security for a debt evidenced by a note or bond, will operate as a security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. *Re Wynne*, 227.
2. But if one deed of trust be executed as a substitute for a preceding one, the former will at once cease to have any validity or effect. *Ib.*

See BANKRUPTCY, 7; SHIPPING, 5, 6.

MUNICIPAL CORPORATIONS.

See CURRENCY, 4, 5; STATES, 4-10.

NEGLIGENCE.

See DEATH.

NEGROES.

Colored persons equally with white persons are citizens of the United States. *Ex parte Turner*, 157.

See APPRENTICES.

NORTH CAROLINA.

See STATES, 2, 3; TREASON, 2.

NOTICE.

See CARRIERS, 2-5.

OFFICERS.

1. The prohibitory provisions of the fourteenth amendment to the Constitution of the United States, did not, instantly, on the day of its promulgation, vacate all offices held by persons within the category of prohibition, and make all official acts performed by them since that day, null and void. *Cæsar Griffin's Case*, 364.
2. Persons in office by lawful appointment or election before the promulgation of this amendment, were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in the third section. *Ib.*
3. Legislation by Congress was necessary to give effect to the prohibition by providing for such removal. *Ib.*
4. The exercise of their several functions by these officers until removed in pursuance of such legislation, is not unlawful. *Ib.*

OFFICERS—Continued.

5. The whole spirit of the Federal Constitution is against *ex post facto* laws, or bills of attainder in form of trials by jury, and denies to the legislature power to deprive any person of life, liberty, or property, without due process of law. *Ib.*
6. A provision which at once without trial deprives a whole class of persons of offices held by them, for cause, however grave, is inconsistent with this spirit and general purpose, and therefore no such construction can be given the third clause of the fourteenth amendment. *Ib.*
7. In the judgment of some enlightened jurists, its legal effect was to remit all other punishment. Such was certainly its practical effect. *Ib.*

See MARSHAL; STATES, 4-10; WAR, 17, 18.

PARTIES.

1. The objection of the want of parties may be taken at any time in the progress of a cause, even in the appellate court. *Carson v. Robertson et al.*, 475.
2. It will be disregarded whenever taken, if it appears that the parties are not necessary, or if, although convenient, and under some circumstances necessary, they can not be made without depriving the court of jurisdiction. *Ib.*
3. On the other hand, if it appears that no final decree can be made without material prejudice to the interests of parties not before the court, the court will not proceed without them, even though such parties are beyond the reach of its process, or can not be made without ousting the jurisdiction. *Ib.*
4. In applying these rules, however, the courts of the United States are always careful to see that no citizen of a state, other than that in which the defendants reside, shall invoke their jurisdiction in vain, unless it is obviously impossible to protect the interests of the absent parties in their decrees. *Ib.*
5. They will strain a point in favor of the constitutional right of citizens of the United States to sue the citizens of the other states in the courts of the United States. It is a right too clear and too important to be lightly disregarded. *Ib.*
6. One of a firm of several partners purchased, with the firm funds, land, substantially for the firm, but the conveyance was taken in his name and that of one of the other members in trust, for whatever use those two, or the survivor of them, might declare, and until then to the use of all the partners. These two made a mortgage upon the land, to secure a sum of money to a third. In a suit to vacate the whole transaction by the parties who owned

PARTIES—Continued.

the land before its sale.—*Held*, that the partner who had actively managed the affairs, being one of those to whom the conveyance was made, was the only necessary party, the other parties being non-resident. *Ib.*

See AGENCY, 9-11; EXECUTORS AND ADMINISTRATORS, 7; PRACTICE, 5-7.

PARTNERSHIP.

See BANKRUPTCY, 16; PARTIES, 6.

PAYMENT.

1. Compulsory payment of a debt to a receiver under the Sequestration Acts of the Confederate Government, is no defense to a suit brought upon such debt by the creditor. *Shortridge & Co. v. Macon*, 136.
2. Any draft, bill, or note drawn in the Confederate States, or in any state, under the proclamation of the President declared in insurrection, or in any part of them (except such part as was permanently and absolutely under the control of the forces of the United States), upon any person or persons in the Federal lines, was absolutely void as to the maker and all other parties thereto, and was not to be received in payment or satisfaction of any debt due to a citizen of a state adhering to the Government. *Moore & Brother v. Foster & Moore*, 222.
3. When such a draft has been received, the jury must be satisfied upon good evidence that it was accepted in satisfaction of the debt. *Ib.*
4. The receipt, during the late civil war, by an agent of the creditor in the Southern States, of Confederate treasury notes in payment of a debt due to a citizen adhering to the National Government, did not discharge the debtor from his debt, though paid in form, and the notes delivered to him as paid by the agent were not paid in fact. *Anderson v. The Bank*, 535.
5. Nothing could discharge him except ratification of the acts of the agent or voluntary release by the creditor, or actual payment in lawful money. *Ib.*

See CURRENCY.

PENNSYLVANIA.

See TAXES, 2, 3.

PLEADING.

1. A plea to a libel which sets up no matter in defense, is substantially a demurrer. *The Sea Gull*, 145.

PLEADING—Continued.

2. When such a plea is overruled, it is in the discretion of the court to allow an answer to be filed, or to enter a decree at once for the damages claimed. *Ib.*
 3. It not having been suggested on the hearing that the facts set forth in the libel were untruly stated, and from other circumstances, the court refused to allow an answer to be filed, on its overruling the plea, and entered a decree for the damages. *Ib.*
- See ADMIRALTY, 13, 14; AGENCY, 9-11.

POSTMASTERS.

1. The policy of the United States requires postmasters and their sureties to be liable in all events; no accident or misadventure will excuse them. *United States v. Morrison*, 521.
2. The only exceptions are those provided for by the acts of Congress, being losses occasioned by the Confederate forces or guerrillas, or such as are occasioned by any other armed forces. *Ib.*
3. No surrender of the property of the post-office department to the Confederate Government under any other than the coercion of armed force, can excuse a postmaster. *Ib.*

PRACTICE.

1. Proceedings for condemnation of lands under the confiscation acts of August, 1861, and July, 1862, may be according to forms used in Admiralty, but they must conform to the course of the common law in respect to the trial of issues of fact and exceptions to evidence, and can only be reviewed after final judgment or decree on writ of error, that writ being the process by which common-law proceedings are reviewed—appeal being the appropriate method in causes of admiralty and maritime jurisdiction. *Semple v. United States*, 259.
2. In this cause the proceeding has properly been by writ of error. *Ib.*
3. But there being no appearance in the court below, there could be no issue of fact, nor direction for trial by jury, and therefore judgment was properly entered by default. *Ib.*
4. If it appeared by the record that an issue had been made and tried by the court without a jury, and without submission by the parties, the judgment would have been reversed. *Ib.*
5. A verdict having been obtained in 1860, no further proceedings are had in the cause until 1867. In the meantime the record has been destroyed. The plaintiff may file a transcript of the record in his possession, upon which a judgment may be entered as upon the original record. *Baldwin v. Lamar*, 432.

PRACTICE—Continued.

6. In such case, the defendant having died in the meantime, his personal representative must be made a party, and a rule served to show cause why the transcript should not be filed, does not operate to make him a party. *Ib.*
7. It seems that when the personal representative is a non-resident, it should be done by *scire facias*. *Ib.*
8. The copy of the record produced was in the possession of the plaintiff. *Ib.*
9. The practice of the State courts in relation to summoning juries, whether statutory or otherwise, does not become the practice of the United States courts until expressly adopted by the latter. *Alston v. Manning*, 460.
10. A jury was summoned according to what had for a long time been the practice of the courts, and the statutory requirements of the State of South Carolina. But before the summoning of the jury, those statutory requirements and the practice of the State courts had been materially modified. The jury is properly summoned. *Ib.*

See PLEADING, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PROCESS.

See ADMIRALTY, 3, 4, 10-12.

REBELLION.

See CONFEDERATE STATES; STATES; WAR.

RECEIVERS.

1. The fact that a corporation is insolvent, will not authorize it to apply to a court of equity for a receiver to wind up its affairs; and *semble* that this would also be the case with a private person. *Hugh v. McRae et al.*, 466.
2. A receiver will be appointed in a proper case at the instance of a creditor, but not at that of the insolvent debtor. *Ib.*

SALES.

See WAR, 9-14.

SALVAGE.

1. The Sherman was lying helpless in a dangerous locality, with her engine broken and useless, and in answer to her signals of dis-

SALVAGE—Continued.

tress, the Gary came to her relief, and contracted with her captain to tow her into Norfolk for fifteen thousand dollars. On their way thither it was determined between them to go to Charleston instead, and while going there, a false alarm was given that they were in shoal water. At this point of time, the hawser connecting the vessels parted, and there was some reason to believe the Sherman cut it, and the wind being favorable, the Sherman pursued her way by using her sails. There was sufficient evidence of a fraudulent purpose on the part of the Sherman to avoid the towage, to justify the Gary in not pursuing her and renewing her offers of assistance. Another steamer towed the Sherman into port. *Held*,—the Gary is not entitled to recover the contract price, but she is entitled to salvage, although the second vessel be also entitled to it; and the second vessel is entitled to it. *The Gary v. The Sherman*, 468.

SEQUESTRATION ACTS.

1. Compulsory payment of a debt to a receiver under the Sequestration Acts of the Confederate Government is no defense to a suit brought upon such debt by the creditor. *Shortridge & Co. v. Macon*, 136.
2. The acts of the Confederate Government confiscating or sequestering property of citizens within the states adhering to the Government of the United States, were null and of no effect. *Keppel's Adm'rs v. Petersburg R. R. Co.*, 167.
3. The sequestration acts of the Confederate States, and all acts under them, injurious to citizens of Union-adhering States, are null and void, and a court of equity will decree such relief in the premises as may be necessary. *Perdicaris v. Charleston Gaslight Co.*, 435.
4. The sequestration act of the Confederate States. *Appendix*, 584.
See CONFISCATION.

SHIPPING.

1. The home port of a vessel is where she is owned and enrolled. *The Lulu*, 162.
2. Such home port being in one State, material-men furnishing her with supplies at a port in another State, between which latter and a third port she was regularly engaged in carrying, may acquire a lien upon her. *Ib.*
3. In such case, *it seems* that if the vessel had been regularly chartered to persons residing at the second port, her home port might have been thereby changed. *Ib.*

SHIPPING—Continued.

4. In order for material-men to make out a case for a lien upon a vessel for supplies furnished, it is incumbent on them to show that there was a necessity existing for the supplies, and that it was necessary to obtain them on the credit of the vessel—that they were furnished to meet this necessity, and with a view by them of looking to the vessel for their security. *Ib.*
 5. It is only in case of necessity for credit that a master can hypothecate his vessel by bottomry bond or express obligation, or create a lien by obtaining repairs and supplies on her credit. *Ib.*
 6. The proof of the necessity for the credit, is as essential as the proof of the necessity for the supplies. *Ib.*
 7. The lien for repairs and supplies is superior to that created by bill of sale or mortgage, whether prior or posterior in time. *Ib.*
- See ADMIRALTY; ATTACHMENT; CARRIERS; SALVAGE; STEAMBOATS.

SOUTH CAROLINA.

See LIMITATIONS OF ACTIONS, 2.

STATES.

1. War levied against the United States by citizens of the Republic under the pretended authority of the new State Government of North Carolina, or of the so-called Confederate Government, was treason against the United States. *Shortridge & Co. v. Macon*, 136.
2. The State of North Carolina, by the Acts of her Convention, in May, 1861, by the previous acts of her Governor, by the subsequent acts of all departments of the State Government, and by the acts of the people at the elections in May, 1861, set aside her State Government and Constitution, connected under the National Constitution with the Government of the United States, and established a new Constitution and Government connected with another so-called central Government, set up in hostility to the United States, and entered upon a course of active warfare against the National Government. *Ib.*
3. By these acts the practical relations of North Carolina to the Union were suspended, but they did not for a moment effect a separation of North Carolina from the Union. *Ib.*
4. The Government of Virginia organized at Wheeling has been recognized by the United States as the rightful Government of that State. *Woodson v. Fleck*, 305.
5. After all organized resistance to the National authority had ceased in Virginia, that Government was established in undisputed exer-

STATES—Continued.

- cise of its authority in Richmond. That Government was thus established during the year 1865. *Ib.*
6. When the *de facto* Government of Virginia was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist. *Ib.*
 7. They continued in being *de facto*, charged with the duty of maintaining order until superseded by the regular Government. *Ib.*
 8. Thus the common council of Harrisonburg, though elected under the *de facto* Government, remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces. *Ib.*
 9. It might have been superseded, for the Government of the United States was not bound to recognize any authority which originated with the *de facto* government. But it was not superseded. *Ib.*
 10. The mayor and common council, therefore, exercising their authority derived from their election, and not by virtue of a military order, have no right to remove a suit from the State to a Federal Court, when that suit has been brought for an alleged false imprisonment, and malicious prosecution thereon, charged to have been committed by them in the discharge of their municipal functions. *Ib.*
 11. The Government established at Wheeling, Virginia, soon after the secession of the State of Virginia, having been recognized by the Executive and Legislative Departments of the National Government as the lawful Government of Virginia, this recognition is conclusive upon the Judicial Department. *Cesar Griffin's Case*, 364.
 12. This Government was in contemplation of law the Government of the whole State of Virginia, though excluded, as the Government of the United States itself was, from the greater portion of the territory of the State. *Ib.*
 13. When the functionaries of the State Government, existing in Virginia at the commencement of the late civil war, took part, together with a majority of the citizens of the State, in rebellion against the Government of the United States, they ceased to constitute a Government for the State of Virginia which could be recognized as such by the National Government. *Ib.*
 14. It is clear that if the Government instituted at Wheeling, was not the Government of the whole State of Virginia, no new State has ever been constitutionally formed within her ancient boundaries, for the existence of the State of West Virginia depends on the consent of Virginia. *Ib.*
 15. When the State Government, recognized by the United States,

STATES—Continued.

was transferred from Alexandria to Richmond, it became in fact what it was before in law, the Government of the whole State; as such it was entitled under the Constitution to the same recognition and respect in national relations as the Government of any other state. *Ib.*

16. The insurgent Government of Virginia during the war was a *de facto* Government. *Evans v. City of Richmond*, 551.
17. As to regulations concerning marriage descents, conveyances of property, everything, in short, which belongs to ordinary business and the common transactions of life, its acts may be upheld as valid. *Ib.*
18. But on the other hand, those acts of any body corporate, or otherwise, which were intended to subvert the authority of the United States, can not be so upheld. *Ib.*
19. *Query.* Can the legislature of the insurgent Government be recognized by the Government as valid? *Ib.*
20. *Query.* Could that legislature authorize cities to issue notes for circulation as currency? *Ib.*
21. The insurgent government of Virginia, especially, must be denied any larger recognition than is authorized by the case of *Texas v. Chiles*, since there existed at this very time another Government within the limits recognized by the Government of the United States as the true and lawful Government of the state. *Ib.*

See COURTS, 6-12; CURRENCY, 4.

STATUTES.

See BANKRUPTCY, 2-4, 6, 13; CITIZENS, 2; TAXES, 2, 3.

STEAMBOATS.

1. The widow and son of a hand killed on a steamboat by the negligence of the engineer, have suffered an injury for which they have a remedy against the owners of the vessel. *The Highland Light*, 150.
2. The Act of Congress makes the fact of the injurious escape of steam full *prima facie* proof of negligence to charge the defendant in all actions against proprietors of steamboats for injuries occasioned by injurious escape of steam. *Ib.*

STOCK.

See CORPORATIONS, 1-3.

TAXES.

1. No British subject resident in Great Britain is liable to the income-

TAXES—Continued.

- tax provided for by sec. 122 of the internal revenue act of June 30, 1864. *Jackson v. Northern Central Railway*, 268.
2. Neither the general tax law of Pennsylvania, Brightly's Dig. ed. 1858, nor the act of assembly of April 30, 1864, contemplate taxing the interest coupons of railroad bonds. *Ib.*
 3. *Semble* : There is nothing in the statutes of Pennsylvania which would authorize the assumption that the legislature of Pennsylvania ever intended to tax bonds, or interest on bonds, held by citizens of other states, or the subjects of foreign powers. *Ib.*
 4. Also *semble* : That a tax on the interest accruing on the loans or stocks issued by corporations, and guaranteed by the state, may be properly collected by deduction and retention by the officers of the corporation. *Ib.*

TORTS.

See ADMIRALTY, 5, 6.

TREASON.

1. Operation of section 3 of the fourteenth amendment to the Constitution of the United States as a bar to proceedings upon an indictment found under previous statutes providing for the punishment of treason. *Case of Jefferson Davis*, 1.
2. War levied against the United States by citizens of the Republic under the pretended authority of the new State Government of North Carolina, or of the so-called Confederate Government, was treason against the United States. *Shortridge & Co. v. Macon*, 136.

See CONFEDERATE STATES, 4, 6.

TRUSTS.

See BANKRUPTCY, 6-11; EXECUTORS AND ADMINISTRATORS; MORTGAGES.

UNLAWFUL FRANKING.

1. An indictment against a member of Congress for unlawfully franking, need not charge that he franked any letter as a member of Congress, nor that he was a member of Congress when the offense was committed. *Deweese's Case*, 531.
2. If this were otherwise, the indictment charging that "J. T. D., member of Congress," committed the offense, sufficiently charged that he did it whilst a member of Congress. *Ib.*
3. An allegation in an indictment that a member of Congress franked letters, not written by himself, namely, envelopes which he con-

UNLAWFUL FRANKING—Continued.

sented should be used by one C., for the purpose of transmitting through the mail certain matter properly chargeable with postage, sufficiently excludes the possibility that the letters were written by the order of the defendant on the business of his office. *Ib.*

4. Though it is *unlawful* for a member of Congress to frank envelopes to be used in transmitting printed circulars through the mail, it is not *penal*. Such do not come within the meaning of the word "letters" in the act of 1825. *Ib.*

VENDOR AND PURCHASER.

See SALES; WAR, 9-14.

VESSELS.

See SALVAGE; SHIPPING; STEAMBOATS.

VIRGINIA.

See STATES, 4-21.

VIS MAJOR.

See CONFEDERATE STATES; POSTMASTERS.

WAR.

1. The suspension of intercourse consequent upon the recent war, did not prevent interest from accruing between citizens adhering to the respective parties thereto. *Shortridge & Co. v. Macon*, 136.
2. War levied against the United States by citizens of the Republic, under the pretended authority of the new State Government of North Carolina, or of the so-called Confederate Government, was treason against the United States. *Ib.*
3. It is the practice of modern Governments when attacked by formidable rebellion, to exercise and concede belligerent rights. These are concessions made by the Legislative and Executive departments in the exercise of political discretion. They establish no rights except during the war. *Ib.*
4. The late civil war did not revoke an agency established in one of the Southern States before the war, by a citizen of one of the Northern States. *Botts & Darnall v. Crenshaw*, 224.
5. The statute of limitations was suspended as between citizens of the Confederate States and citizens of those states which adhered to the National Government during the whole period of the war. *Gooding v. Varn*, 286.

WAR—Continued.

6. As far as South Carolina is concerned, the war began April 19, 1861, and ended April 1, 1866. *Ib.*
7. The Supreme Court of the United States having held (*Hanger v. Abbott*, 6 Wall. 532) that the late war suspended the statute of limitations, and in *Ward v. Smith* (7 Wall. 452), that interest did accrue during the war, in that particular case, making an exception to the general rule that interest does not accrue between citizens or subjects of belligerent states, it may not unreasonably be inferred from the language of the court that if the direct question came before them it would be decided that interest did not accrue between parties to the late civil war. *Bigler v. Waller*, 316.
8. It is the duty of this court to decide the question as it believes the Supreme Court would decide it. *Ib.*
9. Bigler, a citizen of New York, was indebted to Waller, a citizen of Virginia, in the sum of thirteen thousand dollars, due for land sold by Waller to Bigler, which sum was due and payable May 10, 1861. Bigler was excluded from occupation of the estate during the war, the improvements placed on it by him were greatly injured, and Waller was entitled to possession during the war by virtue of a sale under a trust deed and purchase by him of the property. If interest on a debt should cease in any case, it should in this. *Ib.*
10. The proclamation of President Lincoln, of April 19, 1861, declaring a blockade of the ports of the insurgent states must be regarded as the first formal recognition of the existence of civil war by the national authority. *Ib.*
11. The Supreme Court has held that the war ended on August 2, 1866, so far as the captured and abandoned property act is concerned, but they have declined fixing any precise date of termination applicable to all cases. *Ib.*
12. In this case the establishment of the adhering Government of Virginia at Richmond as the recognized Government of the whole state is to be taken as the end of the war in this state. *Ib.*
13. This event took place when the executive department of that Government was removed from Alexandria to Richmond, on May 26, 1865. The period to be excluded in the computation of interest is the time from April 19, 1861, to May 26, 1865. Confederate money received by Waller from the Confederate Government, for damages done the property after Waller was in possession of the same, must be scaled down to its gold value as of the date of its receipt, and interest calculated on the sum thus ascertained. For the amount of this payment and interest Bigler's debt to Waller is to be credited. *Ib.*

WAR—Continued.

14. The proof of damages to Bigler by reason of Waller not performing certain covenants in his contract of sale, being too vague and unsatisfactory to form the basis of decree, no damages are to be allowed him. *Ib.*
15. No agent of the U. S. Treasury Department, under the captured and abandoned property act, was justified in receiving, after June 30, 1865, any captured or abandoned property unless theretofore surrendered by Confederate agents or officers, much less making any seizure of unsurrendered property. *McLeod v. Callicott*, 443.
16. Property surrendered by the military authorities of the Confederate Government could not be released by any state or provost court. *Ib.*
17. A treasury agent, acting under color of the captured and abandoned property act, under which he is appointed, or under a mistaken sense of duty, can not be held responsible in a suit at law, or other personal proceeding. *Ib.*
18. The only remedy provided for the injured party is his right to prosecute his suit before the Court of Claims, within two years after the close of the war. *Ib.*
19. The courts of a state forming part of the Confederate states had no jurisdiction during the civil war over parties residing in states which adhered to the National Government. *Livingston v. Jordan*, 354.
20. As between parties residing in South Carolina and parties residing in states adhering to the National Government, the courts of South Carolina could have no jurisdiction while the war continued. *Ib.*
21. The late civil war did not revoke an agency in the Southern states, established before the war, by a citizen of one of the Northern states. *Anderson v. The Bank*, 535.

See CURRENCY, 5; PAYMENT.

WAREHOUSEMEN.

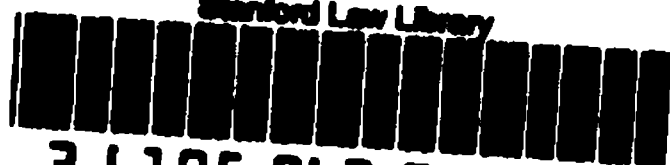
A court of the United States has, in general, no jurisdiction of suits against warehousemen by citizens of the same state. *The Mary Washington*, 125.

See CARRIERS, 4, 5.

WRONGS.

See ADMIRALTY, 5, 6.

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